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Intentional Infliction of Mental Harm

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Abstract

The aim of this thesis is to deal with the liability elements of the delict or tort of intentional infliction of mental harm, or, more precisely, to explore questions arising from the three essential elements of the *Wilkinson v Downton* tort reformulated in *Rhodes v OPO*. To tackle these issues, this thesis is divided into four main chapters (chapters 2 to 5), followed by chapter 6 which provides the conclusion.

The conduct element of the *Wilkinson/Rhodes* tort, or the tort of intentional infliction of mental harm, will be investigated in chapter 2, which will be further divided into three parts. Part A provides the general introduction of conduct element, where the construction of conduct patterns of this tort through a combination of different types of conduct and various aggravating factors will be proposed. In Part B, the three archetypal conduct patterns of this tort will be dissected and then compared to other five recognised torts/delicts, to draw the boundaries and see the applicability of this tort beyond these recognised torts/delicts. In Part C, the role played by the requirement of ‘no justification or excuse’ in respect of the conduct element will be probed, and the potential justificatory grounds for conduct of this tort will then be explored.

The mental element of the *Wilkinson/Rhodes* tort will be investigated in chapter 3. This thesis will argue that, in addition to ‘intention based upon purpose (ends or means)’, the mental element of this tort should also include ‘intention based upon knowledge (foresight with substantial certainty)’, whilst ‘recklessness’ should be excluded. Inferred or constructive foresight/intention should be accepted for these purposes, along with actual or subjective foresight/intention. Where the object of intention can be perceived as ‘(severe) mental or emotional distress’, the notion of ‘foresight with substantial certainty’ may arguably be regarded as the most suitable interpretation of the equivocal term ‘calculated’.

The consequence element of the *Wilkinson/Rhodes* tort will be investigated in chapter 4. After examining the traditional distinction between recognised psychiatric illness and mere emotional distress, the boundary of mental harm will be delineated as *deviation from normal or trivial emotions*. Arguably, this concept of mental harm can be differentiated from recognised psychiatric illness as well as from mere emotional distress. Whether or not recognised psychiatric illness, as the traditional threshold of compensable damage of this tort, can to some extent be lowered will then be explored. If it is warranted that this traditional threshold can be lowered to ‘mental harm’ or ‘severe/significant emotional distress’, the relevant criteria for finding ‘mental harm’ will be analysed with examples.

Issues regarding secondary victims in the realm of intentional infliction of mental harm will be investigated in chapter 5. First of all, it will be argued that secondary victims, whose mental harm is inflicted intentionally rather than negligently, should be entitled to a claim based upon this tort. Thereafter the prerequisites of this sort of claim will be explored. It will be argued that the prerequisites suggested, particularly in regard to the mental element, can adequately ring-fence liability for secondary victims in this intentional field. The limiting factors as regards proximity, as employed in negligence cases, remain important considerations in respect of this tort, although they need not be adopted as categorical limitations.

Based upon these analyses and arguments, in chapter 6 a reconstructed framework of the *Wilkinson/Rhodes* tort will be proposed, which can arguably furnish answers to the long-debated problems in regard to this tort.

Lay Summary

The aim of this thesis is to deal with the liability elements of the delict or tort of intentional infliction of mental harm. The overall research question can be presented as: *under what conditions should intentionally inflicted (stand-alone) mental harm be recoverable?* Derived from this question, more specific issues include: 1) What qualifies as the conduct of this tort? Is there any ground that may justify the conduct of this tort? 2) What constitutes intention in regard to this tort? 3) What level of mental harm or emotional distress inflicted on the part of the victim can be taken as compensable? Must the victim be labeled by psychiatric experts as having developed a certain kind of (recognised) psychiatric illness? 4) If, through the wrongdoer's intentional conduct, mental harm is inflicted on a victim intentionally but indirectly – i.e. the victim is not the direct target of the wrongdoer's conduct, can the victim claim for compensation under this circumstance? In order to tackle these issues, this thesis is divided into four main chapters. A reconstructed framework of the tort of intentional infliction of mental harm will then be proposed, which can arguably provide answers to the questions raised above.

Declaration

I, Po-Yuan Chang, hereby declare that I have composed this thesis, that the work contained in it is my own, and that it has not been submitted for any other degree or professional qualification.

Po-Yuan Chang
Edinburgh
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Chapter 1 Introduction

The subject of this thesis is the tort of intentional infliction of mental harm. Its research question is: *under what conditions should intentionally inflicted (stand-alone) mental harm be recoverable?*¹ Drawing upon an in-depth analysis of English, Scottish, and comparative material it provides answers to the enduring problems encountered in this area of liability and offers suggestions as to how this delict or tort may be taken forward into the twenty-first century.

1.1 Background and questions

A useful starting point in explaining the background to this thesis is the English case of *Wilkinson v Downton*.² In that case the defendant, by way of a misguided practical joke, fabricated a story to the effect that the plaintiff's husband had been severely injured in an accident and required immediate assistance to bring him home. The plaintiff believed the story, and suffered a 'violent shock to her nervous system' with 'serious and permanent physical consequences'.³ These facts were held to constitute a good cause of action in tort. The defendant had 'wilfully done an act calculated to cause physical harm to the plaintiff...and ha[d] in fact thereby caused physical harm to her', 'there being no justification alleged for the act'.⁴ Over the years, however, this decision has engendered several controversies,⁵ among which three obvious questions

¹ For more detail on the research question presented here see the last part of section 1.1.

² *Wilkinson v Downton* [1897] 2 QB 57.

³ *ibid* at 58 per Wright J.

⁴ *ibid* at 58-59 per Wright J.

⁵ '*Wilkinson v Downton* [1897] 2 QB 57 has long puzzled writers on the law of torts.' See M Lunney, 'Practical Joking and Its Penalty: *Wilkinson v Downton* in Context' (2002) 10 Tort L Rev 168 at 168; 'The enduring charm of this cause of action lies in the cryptic nature of the description of the tort in *Wilkinson* itself, which creates plenty of room for debate about exactly what the criteria for liability are.' See D Réaume, 'The Role of Intention in the Tort in *Wilkinson v Downton*' in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (2007) 533 at 533. Relevant analyses of the tort of *Wilkinson v Downton* see also P Handford, 'Wilkinson v Downton and Acts Calculated to Cause Physical Harm' (1985) 16 UWAL Rev 31; PR Glazebrook, 'Wilkinson v Downton: A Centenary Postscript' (1997) 32 IJNS 46; C Slade, 'Intentional Infliction of Mental Suffering:

arise. The first is how ‘wilfully’ and ‘calculated’ should be interpreted, and how they are related to ‘intention’. The second concerns the level of injury required in order for liability to arise in cases where the nervous shock or mental harm has not developed into physical harm. The third, which has received less attention, relates to the kind of justification that can be raised to justify the alleged conduct.

After the decision in *Wilkinson v Downton* the dicta by Wright J were invoked as a basis for claims in a variety of different contexts, with varying degrees of success. The various circumstances include, for instance: threatening/terrifying others in order to reach an unlawful goal;⁶ harassment (committed before the passage of the Protection from Harassment Act 1997);⁷ insults;⁸ invading others’ physical privacy or personal integrity;⁹ or ‘emotionally manipulating [a minor] and encouraging her to send indecent images of herself’ in concomitance with sexual abuse.¹⁰ In *Rhodes v OPO*, which is now the leading case, an injunction had been sought by his former wife, on the basis of the principles in *Wilkinson v Downton*, to prevent Rhodes from publishing a book disclosing his true life story, details of which had the potential to inflict mental harm upon his minor son. The injunction was refused at first instance but granted by the Court of Appeal. The Supreme Court, however, allowed Rhodes’ appeal and set aside the injunction. The reasoning of the Supreme Court will be discussed at far greater length later in this thesis, but for present purposes it is important to note that

Reconsidering the Test for Liability’ (2008) 34 *Advoc Q* 322; E Reid, ‘Protection of Personality Rights in the Modern Scots Law of Delict’ in NR Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 247 at 4.2.2; Ying Khai Liew, ‘The Rule in *Wilkinson v Downton*: Conduct, Intention, and Justifiability’ (2015) 78 *MLR* 349; CDL Hunt, ‘*Wilkinson v Downton* Revisited’ (2015) 74 *CLJ* 392; A Gray, ‘*Wilkinson v Downton*: New Work for An Old Tort to Do?’ (2015) 23 *Tort L Rev* 127; R Mulheron, ‘The Rule in *Wilkinson v Downton*’ (online chapter) in R Mulheron, *Principles of Tort Law* (2016), available at www.cambridge.org/mulheron; P Handford, *Tort Liability for Mental Harm* (3rd edn, 2017) ch 30; P Roycroft, ‘*Wilkinson v Downton* After *Rhodes* and Its Future Viability in New Zealand’ (2017) 48 *VUWLR* 107.

⁶ See the contexts of *Janvier v Sweeney*. In this case, the Court of Appeal approved the reasoning in *Wilkinson v Downton* and held *Janvier* as a ‘much stronger case’ than *Wilkinson*. See *Janvier v Sweeney* [1919] 2 *KB* 316 at 324 per Bankes LJ; at 326 per Duke LJ.

⁷ See *Khorasandjian v Bush* [1993] *QB* 727; *Wong v Parkside Health NHS Trust* [2001] *EWCA Civ* 1721; [2003] 3 *All ER* 932.

⁸ See *Austen v University of Wolverhampton* [2005] *EWHC* 1635 (QB).

⁹ See *Wainwright v Home Office* [2003] *UKHL* 53; [2004] 2 *AC* 406; *C v D, SBA* [2006] *EWHC* 166 (QB).

¹⁰ See *ABC v WH 2000 Ltd v William Whillock* [2015] *EWHC* 2687 (QB), in particular at para 89 per Sir Robert Nelson.

the majority reformulated the prerequisites of the *Wilkinson* tort into a conduct element, a mental element, and a consequence element, as follows:

‘We are inclined to the view...that the tort is sufficiently contained by the combination of a) the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse, b) the mental element requiring an intention to cause at least severe mental or emotional distress, and c) the consequence element requiring physical harm or recognised psychiatric illness.’¹¹

This reformulation can be taken as significant due to two reasons. Firstly, through this reformulation the Supreme Court explicitly approved of *Wilkinson v Downton* as presenting a valid cause of action, which had not been subsumed into the tort of negligence.¹² Moreover, through this reformulation, some light has been shed on the puzzling liability criteria of this tort. For example, it is very helpful that the Supreme Court has now specified the object/target of the defendant’s intention as ‘at least severe mental or emotional distress’,¹³ rather than confining this to notions of physical harm or recognised psychiatric illness. It is also sensible that the Supreme Court excluded the notion of *recklessness* from the required mental element.¹⁴ Nevertheless, the three questions raised at the start of this chapter remain unresolved, or at least, not fully clarified. The important questions which remain after this reformulation can be stated as follows.

¹¹ *Rhodes v OPO* [2015] UKSC 32; [2016] AC 219 at para 88 per Lady Hale and Lord Toulson.

¹² Lord Hoffmann remarked in *Wainwright v Home Office* that there was no longer a need to ‘fashion a tort of intention’ since the facts of *Wilkinson* could comfortably be accommodated ‘in the law of nervous shock caused by negligence’ by the time of *Janvier v Sweeney*. See *Wainwright v Home Office* (n 9) at para 40 per Lord Hoffmann. However, in *Rhodes v OPO*, the Supreme Court considered Lord Hoffmann’s comments on Wright J’s judgment to have misinterpreted the decision. The notion of ‘imputed intention’ was not ‘devised by Wright J to get around a perceived stumbling block in the law of negligence’. Moreover, ‘negligence and intent are very different fault elements’, which should be differentiated in respect of the ‘bases (and possible extent) of liability for causing personal injury’. See *Rhodes v OPO* (n 11) at paras 62–63 per Lady Hale and Lord Toulson. Relevant analyses see Chapter 3, section 3.11.

¹³ The analysis of ‘the object of intention’, see Chapter 3, section 3.22.

¹⁴ *Rhodes v OPO* (n 11) at para 87 per Lady Hale and Lord Toulson. Relevant analyses see Chapter 3, section 3.661.

Following the order of the restated elements, first of all, what qualifies as the conduct of this tort seems to be open-ended. In addition, it is not self-evident what role the notion of justification/excuse plays in regard to the conduct element, or what kind of justification/excuse can be raised. Secondly, despite some clarification as regards the object of intention, it remains unclear how intention should be understood for these purposes, and how intention relates to the notion of ‘calculated’ found in *Wilkinson*. Thirdly, although the majority of the Supreme Court articulated the required consequence as ‘physical harm or recognised psychiatric illness’,¹⁵ Lord Neuberger argued that ‘it should be enough for the claimant to establish that he suffered significant distress as a result of the defendant’s statement’.¹⁶ What is the conceptual difference between recognised psychiatric illness, severe/significant emotional distress, and mere emotional distress? Is there any cogent ground for maintaining or lowering the threshold of recognised psychiatric illness? Can a more appropriate threshold of compensable damage be set for this tort? All of these questions in relation to the consequence element need to be answered. Fourthly, a further question arises from the term ‘directed at’ employed in the conduct element.¹⁷ Since the alleged wrongdoing must be ‘directed at’ the claimant, does that mean victims injured *indirectly* – i.e. the secondary victims – would have *no* claim on the basis of *Wilkinson v Downton*? Alternatively, given that the circumstances of *Rhodes v OPO* had no bearing on secondary/indirectly injured victims, and the absence of English or Scottish authority directly in point, does scope still remain for secondary victims to recover for their mental harm (inflicted by the wrongdoers’ intentional acts)? This question also requires investigation.

The focus of this thesis will be upon the foregoing questions, which arise from the three essential elements of the *Wilkinson* tort reformulated in *Rhodes v OPO*. These questions remain underexplored in English and Scottish literature, yet answering them is crucial to the future application of the *Wilkinson/Rhodes* tort. The research presented in this thesis is therefore both timely and important in terms of its original contribution.

¹⁵ *ibid* at para 88 per Lady Hale and Lord Toulson.

¹⁶ *ibid* at para 119 per Lord Neuberger.

¹⁷ Namely, ‘the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse’. See *ibid* at para 88 per Lady Hale and Lord Toulson.

The structure and main points of this thesis will be set forth in section 1.4.

1.2 Methodology and Scope

This thesis is founded upon a systematic and comprehensive investigation of existing case law in this area and relevant commentary. Through this critical analysis, the current law will be clarified, and feasible models will be constructed in regard to particular aspects of this tort, with a view to assisting its future application. Moreover, in order better to define the boundary and applicability of the *Wilkinson* tort, systematic comparisons will be made at various points with other related torts.

In terms of case law pertinent to the *Wilkinson* tort, the existent decisions are predominantly English. However, as will be argued in section 1.3, the *Wilkinson* tort is also of relevance to Scots law. At the same time given that the English and Scottish authorities are relatively few, and indeed insufficient to provide comprehensive answers to all of the questions explored here, comparative references will also be included. The main comparative sources will be Canadian and Australian cases. The *Wilkinson* tort has continued to evolve in these two Commonwealth jurisdictions, and it is therefore helpful to consider developments there as an aid to understanding how the law may progress in this area.

The scope of this thesis centres upon the questions arising from the three essential elements of the *Wilkinson* tort reformulated in *Rhodes v OPO* – i.e. issues regarding conduct and justification, issues regarding intention, issues regarding mental harm, and issues regarding secondary (indirectly injured) victims. In other words, other general issues which may be relevant to the *Wilkinson* tort – such as causation and remoteness; distinctions in English law between different categories of damages; vicarious liability; compensation for negligently caused psychiatric injury and its prerequisites – are *not* within the scope of this thesis, although some of these topics may be touched upon where necessary.

1.3 The applicability of the *Wilkinson/Rhodes* tort in Scots law

Apart from cases from Canada and Australia, as mentioned above, the existing decisions in relation to the *Wilkinson* tort are mostly English. Whether or not the *Wilkinson* tort can be applied in Scotland is therefore not settled beyond all doubt. However, in the light of dicta in the Scots authorities, the *Wilkinson* tort appears to have been acknowledged in the Scots law of delict. First of all, *Wilkinson v Downton* was considered as a sound ‘ground of action’ by Lord Johnston in *A v B’s Trustees*.¹⁸ Similarly, in *Bourhill v Young*, reference was made to *Wilkinson* (admittedly in obiter remarks by Lord Porter) in terms that indicated equal acceptance of its relevance on both sides of the border:

‘In all three countries [England, Scotland and Ireland], no doubt, shock occasioned by deliberate action affords a valid ground of claim: see *Wilkinson v. Downton* and *Janvier v. Sweeney*...’.¹⁹

In modern case law, the applicability of the *Wilkinson* tort is reflected in the Outer House decision in *Robertson v The Scottish Ministers*, a case regarding persistent harassment and bullying at workplace that caused ‘anxiety and distress, leading on to more serious psychiatric illness’.²⁰ The pursuer raised her claim against her employers upon three different grounds. In relation to the second claim (vicarious liability for intentionally inflicted harm),²¹ notably, Lord Emslie considered the dicta provided in several *Wilkinson* authorities before he decided to allow this claim to go to proof.²²

¹⁸ ‘I am prepared to hold that that is as good a ground of action as that which was sustained in *Wilkinson’s* case.’ See *A v B’s Trustees* (1906) 13 SLT 830 at 832 per Lord Johnston.

¹⁹ *Bourhill v Young* 1942 SC (HL) 78 at 100-101 per Lord Porter.

²⁰ *Robertson v The Scottish Ministers* [2007] CSOH 186 at para 1 per Lord Emslie.

²¹ *ibid* at para 2 per Lord Emslie.

²² *ibid* at paras 14-19 per Lord Emslie.

In addition to these judicial dicta, academic commentary also points to the acceptance of the *Wilkinson* tort in Scots law.²³ Also, some light has been shed by the Scottish Law Commission's 2017 Report on *Defamation*. In this report, whilst advising that 'a defamatory statement should only be actionable where it is published to someone other than the person who is the subject of it',²⁴ the Scottish Law Commission argued that 'hurt feelings or damage to self-esteem' caused by a statement communicated solely to its subject, e.g. through '[o]ffensive emailing and texting', would better be tackled by the 'law against harassment and by communications legislation' as well as by the 'delict of intentional infliction of mental harm'.²⁵ On the assumption that the Scottish Courts were prepared to accept the dicta provided in *Rhodes*, the Scottish Law Commission argued that the wrong of 'intentional infliction of mental harm' may have a role to play in this regard.²⁶

In brief, despite the intellectual framework of Scots law of delict being different from its English counterpart, there seem to be credible grounds for recognising the *Wilkinson* tort in Scots law as a basis of delictual liability. Accordingly, the lack of clarity and unresolved questions arising from *Wilkinson v Downton* or from the three essential elements reformulated in *Rhodes v OPO* also present problems for Scots law. For instance, Reid pointed out the uncertainty as to whether, in Scots law, 'in the absence of actual or threatened physical aggression or any other wrong, there exists a right of action against a defender who has intentionally inflicted emotional distress with effects falling short of recognised physical or psychiatric harm'.²⁷ Since equivalent gaps also exist in Scotland, the analysis and reconstruction of the essential elements of the *Wilkinson/Rhodes* delict, which will be done in this thesis, should be of relevance and of use to Scots law.

²³ DM Walker, *The Law of Delict in Scotland* (2nd rev edn, 1981) 499-500, 669-671; K Mck Norrie, 'The Intentional Delicts' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (2000) 477 at n 146; Reid (n 5) at section 4.2.2; Handford, *Tort Liability for Mental Harm* (n 5) para 30.70.

²⁴ Scottish Law Commission, *Defamation* (Scot Law Com No 248, 2017) para 2.4.

²⁵ *ibid.*

²⁶ See *ibid* para 2.7. Namely, 'a person who intended to cause another person to suffer severe mental or emotional distress bore the risk of liability in law if the deliberately-inflicted distress caused the other person to suffer a recognised psychiatric illness'.

²⁷ Reid (n 5) at section 4.2.2.

Lastly, it should be noted that the *actio iniuriarum*²⁸ – or affront-based delicts²⁹ – will *not* be dealt with in this thesis, based on the following reasons. First of all, it seems to be unsettled whether the *actio iniuriarum* can be revitalised in modern Scots law and play a more active role in protecting rights of personality. Diverse views in regard to this controversial question have already been explored at length in academic commentaries.³⁰ Secondly, there seems to be recognition of the authority of *Wilkinson* in the above-mentioned Scots case law, and indeed Scottish Law Commission Report on *Defamation* proceeded on the basis that the Scottish Courts were prepared to accept *Wilkinson*, and the reformulation in *Rhodes*, without reference to the *actio iniuriarum*. In a similar vein, Birks argued more than 20 years ago, that although ‘the common law does recognise the delict *iniuria*’, in order to further ‘remedial activity’, ‘an

²⁸ ‘*Actio iniuriarum*’ can be defined as ‘an action raised in response to an attack on one of the interests protected by, and prohibited under, the concept of *iniuria*, or injury’. And three quintessential characteristics in regard to ‘*iniuria*’ or ‘injury’ can be observed as ‘affront, intent and the distinction between real and verbal injuries’. See K Mck Norrie, ‘The *Actio Iniuriarum* in Scots Law: Romantic Romanism or Tool for Today?’ in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (2013) 49 at 51.

²⁹ According to Norrie, ‘many of the modern forms of liability traced to the *actio iniuriarum* may conveniently be referred to as the “affront-based delicts”’. See *ibid* at 52. According to Whitty, ‘affront-based delicts’ can be perceived as those in regard to which ‘solatium is awarded for wounded feelings arising from infringement of an interest which consists of or includes a non-patrimonial interest in an aspect of personality’. See NR Whitty, ‘Overview of Rights of Personality in Scots Law’ in NR Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 147 at 205.

³⁰ For instance, Whitty argued for modernising the *actio iniuriarum* – or the ‘delict of real and verbal injury’ – as the ‘legal source of new causes of action for the infringement of personality rights’. See Whitty (n 29) at 243-246. In contrast, Reid argued that ‘it is questionable whether it [*actio iniuriarum*] offers a sustainable model for the modern development of personality right protection... Without the jurisprudence that has informed the modern development of the doctrine in South Africa, it is difficult to see how in Scotland the *actio iniuriarum* could now be revived and reformed...’. See Reid (n 5) at 305. Whilst MacQueen pointed out the potential of the *actio iniuriarum* in protecting against ‘intrusions upon individual privacy’, he also mentioned the likelihood that ‘the *actio iniuriarum* in Scotland... cannot yet be said to form a very solid platform of either principle or precedent for further development of the common law of Scotland relating to the protection of privacy...’. See HL MacQueen, ‘A Hitchhiker’s Guide to Personality Rights in Scots Law, Mainly with Regard to Privacy’ in NR Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 549 at 564-565 (in particular the first sentence of section 12.6.1). Moreover, Hogg considered that either ‘a reinvigorated *actio iniuriarum*’ or ‘development of a nominate delict to prevent invasion of privacy’ can be a solution to the question as to ‘how protection will be afforded to the unauthorised exploitation of personal images’. See M Hogg, *Obligations* (2nd edn, 2006) 81-82. Cameron remarked that, despite being able to ‘serve as a model for future development more generally’, the (development of) *actio iniuriarum* is ‘regarded in some quarters with scepticism’. Notably, Cameron made this comment in his fourth edition book, rather than in the latest version (5th edn, 2019). See G Cameron, *Delict* (4th edn, 2011) 83. Although the *actio iniuriarum* is ‘certainly more than a romantic Romanism in Scots law’, Norrie commented, that ‘the law’s general resistance to regarding emotional hurt as a loss is sound, and the identification of the circumstances in which that redress is justified is and should be driven by other forces than the ghosts of the past’. See Norrie (n 28) at 65.

independent tort of contemptuous harassment', or even other torts, should also be recognised and developed.³¹ In a sense the task undertaken by this thesis can be deemed as taking forward the challenges set out by Birks. Although currently the tort of harassment has been established on the basis of the Protection from Harassment Act 1997, gaps still remain³² and may be filled by the development or reconstruction of this tort/delict.

1.4 Structure and main points

In order to explore questions arising from the three essential elements of the *Wilkinson* tort reformulated in *Rhodes*, this thesis is divided into four main chapters (chapters 2 to 5), followed by chapter 6 which provides the conclusion.

In chapter 2, the conduct element of the *Wilkinson/Rhodes* tort, or the tort of intentional infliction of mental harm, will be investigated. This chapter will be further divided into three parts. Part A provides the general introduction to the conduct element, in which the core research questions will be raised, and the conduct patterns of this tort will be constructed through a combination of different types of conduct and various aggravating factors. In Part B, the crucial ingredients of the three archetypal conduct patterns of this tort will be examined and then compared to five other recognised torts/delicts, in order to draw its boundaries and to ascertain the applicability of this tort in areas which these recognised torts/delicts do not reach. In Part C, the role played by the requirement of 'no justification or excuse' in respect of the conduct element will be probed, and the potential justificatory grounds for conduct of this tort will then be explored.

Chapter 3 will analyse the mental element of the *Wilkinson/Rhodes* tort. Under the heads of 'intention based upon purpose (ends or means)', 'intention based upon knowledge (foresight with substantial certainty)', and 'recklessness', this chapter will

³¹ P Birks, 'Harassment and Hubris The Right to an Equality of Respect' (1997) 32 IJNS 1 at 44.

³² See Chapter 2, section 2.225 in regard to the boundary between the statutory tort of harassment and this tort/delict.

explore different interpretations of the term ‘calculated’ as employed in *Wilkinson v Downton*, as well as the foundations of intention. A more appropriate construction of ‘calculated’ and intention will then be proposed.

In chapter 4, the consequence element of the *Wilkinson/Rhodes* tort will be considered. Firstly, the traditional distinction between recognised psychiatric illness and mere emotional distress will be reviewed, and the boundary of mental harm will be delineated. The question whether or not recognised psychiatric illness, as the traditional threshold of compensable damage of this tort, can to some extent be lowered will then be explored, and the relevant criteria for fixing the lowered threshold (‘mental harm’ or ‘severe/significant emotional distress’) will be analysed with examples.

In chapter 5, the first question to be examined is whether secondary victims whose mental harm is inflicted intentionally should be entitled to a claim based upon this tort. Thereafter the prerequisites of this category of claim will be scrutinised in sections concerning, respectively, the conduct element, the mental element, and the consequence element of this tort. A view will then be offered on the extent to which these suggested prerequisites can adequately ring-fence liability in regard to secondary victims in this intentional field.

Chapter 6 will draw together the analysis of previous chapters, and on that basis it will propose a reconstruction of the framework of the *Wilkinson/Rhodes* tort. This reconstruction will suggest solutions to the fundamental questions identified at the beginning of this chapter.

Chapter 2 Conduct and Justification

The conduct element of the *Wilkinson/Rhodes* tort, or the tort of intentional infliction of mental harm, is investigated in this chapter. The chapter will be divided into three parts. Part A provides the general introduction to the conduct element, and raises the core research questions regarding conduct patterns as well as justifications. Moreover, it will be suggested that the gravity of conduct – observed mainly in the form of aggravating factors – may be a requirement of the conduct element. The conduct patterns of this tort can be constructed through a combination of different types of conduct and various aggravating factors. In Part B, the three archetypal conduct patterns of this tort will be explored. The crucial ingredients of these patterns, including relevant aggravating factors, will be analysed and the corresponding case law of different jurisdictions will be reviewed. Furthermore, the three conduct patterns falling within this tort will be compared to those observed in five other established torts, in order to draw boundaries and to ascertain the scope for this tort. Part C will examine whether the requirement that there should be ‘no justification or excuse’ is an integral part of the conduct element. The potential justifications/justificatory grounds will then be considered and analysed.

Part A

2.1 Introduction

2.11 In general

In the milestone Supreme Court case, *Rhodes v OPO*, the conduct element was acknowledged as the first of three essential pillars of the *Wilkinson v Downton* tort, which requires ‘words or conduct directed at the claimant for which there is no

justification or excuse'.¹ Leaving this element as inclusive as possible, the Supreme Court did not fully investigate the patterns or the nature of conduct required. Likewise, the question as to the unjustifiability of a wrongdoing was said to 'depend on the context'.² Although the wrongdoing in respect of this tort could broadly be classified as 'deceptive', 'threatening', or 'abusive',³ its exact features have not been pinpointed with clarity. Accordingly, it is not easy to distinguish an actionable act from one which is not actionable. It may also be difficult to distinguish this tort from other recognised torts with which these 'deceptive', 'threatening', or 'abusive' characteristics are to an extent shared features. In order to delineate this tort more distinctly, it is important to examine further the conduct patterns related to the *Wilkinson v Downton* tort. As a result, the first question for this chapter is: *what is the essential nature or pattern(s) of conduct of this tort that is the key to its actionability, and distinguishes it from other recognised torts?*

Following the first question, the qualification of the conduct element – namely, 'for which there is no justification or excuse' –, also requires some exploration. Does the Supreme Court intend 'the absence of justification or excuse' to be an integral part of the conduct element, or does the Supreme Court simply point out that certain justifications or excuses can be raised as a *defence* for committing the conduct of this tort? And, what kind of justification/justificatory grounds can potentially be raised to defeat the conduct element, or to justify otherwise wrongful conduct?

In investigating the above questions, given that the existent Scottish and English cases are few in number, a number of *Wilkinson* descendent cases decided in Canada and Australia are also examined in order to shed light upon the nature and patterns of conduct which are of relevance.

Before the case review, a brief introduction is needed for the conduct element required *in different jurisdictions* in relation to the *Wilkinson* tort, or the tort of intentional

¹ *Rhodes v OPO* [2015] UKSC 32; [2016] AC 219 at para 88 per Lady Hale and Lord Toulson.

² *ibid* at para 111 per Lord Neuberger.

³ *ibid* at para 77 per Lady Hale and Lord Toulson.

infliction of mental harm. Different requirements may signify different *kinds* of conduct which are actionable under this head of tort. Prior to *Rhodes*, the original conduct requirement, as set out in *Wilkinson v Downton*, was ‘an act calculated to cause physical harm’ and ‘to infringe [the plaintiff’s] legal right to personal safety’ without justification for the alleged wrongdoing.⁴ *Calculated to cause (physical) harm* appears to be more related to the mental element of this tort,⁵ but *infringing the plaintiff’s legal right to personal safety* belongs with the analysis of conduct. The Supreme Court in *Rhodes* has now rephrased the conduct element as ‘words or conduct directed at the claimant for which there is no justification or excuse’,⁶ which discloses little more about this element. The requirements of this tort prior to *Rhodes* are principally explored in Australian case law. The original requirement of a *wilful (or deliberate) act calculated to cause harm without justification* is preserved – mainly interpreted as an *act (reasonably) likely to cause harm without justification*. No new ingredient has yet been added into the conduct element.⁷ By contrast in Canada the *Wilkinson* tort requires that the conduct on the part of the wrongdoer be flagrant, extreme, or outrageous. The requirement of *flagrant, extreme, or outrageous* indicates that the conduct/wrongdoing at issue must be sufficiently *grave* to be actionable. This is a point worthy of further exploration.

2.12 Gravity as a requirement: patterns of conduct and aggravating factors

In Canada, the requirement of *flagrant, extreme, or outrageous* conduct had been well

⁴ *Wilkinson v Downton* [1897] 2 QB 57 at 58-59 per Wright J.

⁵ Different interpretations as to the term ‘calculated’ will be analysed in Chapter 3.

⁶ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson. The elements reformulated in *Rhodes* have been followed in *ABC v WH 2000 Ltd v William Whillock* [2015] EWHC 2687 (QB) at para 89 per Sir Robert Nelson. These elements have also been employed in a recent decision, see *Brayshaw v Partners of Apsley Surgery & O’Brien* [2018] EWHC 3286 (QB) at para 56 per Mr Justice Martin Spencer, although the claim based upon the tort of ‘intentional infliction of harm’ failed in the end.

⁷ On the conduct element in Australia, see *Clavel v Savage* [2013] NSWSC 775 at para 36 per Rothman J; *Dickens v New South Wales* [2017] NSWSC 1173 at para 33 per Fagan J. On the Australian authorities as regards this cause of action, see *Clavel v Savage* at paras 11-36 per Rothman J; *Dickens v New South Wales* at paras 34-40 per Fagan J. See also *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377 at paras 66-83 per Spigelman CJ.

established since *Rahemtulla v Vanfed Credit Union*,⁸ and then followed by a line of authorities.⁹ This requirement is comparable to the conduct element employed in Restatement (Third) of Torts §46 in relation to ‘intentionally or recklessly caused emotional harm’.¹⁰ However, rather than transplanting foreign legal approaches into native soil, McLachlin J in *Rahemtulla* interpreted this flagrant, extreme, or outrageous element as an intrinsic character of the tort as derived from *Wilkinson v Downton* and *Janvier v Sweeney*. In other words, the wrongdoing found in both *Wilkinson* and *Janvier* is regarded as ‘in fact flagrant and extreme’.¹¹ McLachlin J took a step further and assumed that ‘only flagrant and extreme conduct inflicting mental suffering is actionable’.¹² This Canadian approach was noted in *Rhodes v OPO*, but not followed there.¹³ Nevertheless, the Canadian interpretation is noteworthy as, arguably, it has unveiled the nature of the *Wilkinson* tort, indicating that there is an important question of degree, a point explored further below.

The English, Canadian and Australian case law reviewed below indicates that the recurring patterns of conduct of this tort can be classified under four heads: 1) playing on or interfering with the victims’ emotional bonds with their nearest and dearest (mostly) through false statements; 2) threatening or coercing victims into doing something; 3) insults or other abusive conduct; 4) inflicting mental harm through injury to a third party. The first three types roughly correspond to the archetypal characteristics of this tort mentioned in *Rhodes* – which are ‘deceptive’, ‘threatening’, or ‘abusive’.¹⁴ The fourth category relates to what might be termed secondary victims,

⁸ *Rahemtulla v Vanfed Credit Union* [1984] 3 WWR 296 at paras 53-55 per McLachlin J.

⁹ See *Boucher v Wal-Mart Canada Corp* 2014 ONCA 419 at para 50 per Laskin JA; *Hudspeth v Whatcott* 2017 ONSC 1708 at para 245 per Perell J; *Champ’s Mushrooms v Guo* 2018 BCSC 650 at para 90 per Mr Justice Harvey. Other authorities prior to *Boucher* which employed this criterion include: *Pacific Press v C E P, Local 115-M* 52 CLAS 427; *Prinzo v Baycrest Centre for Geriatric Care* [2002] OJ No 2712; *CVC Services v IWA-Canada, Local 1-71* 38 CCEL (2d) 141; *Campbell v Wellfund Audio-Visual Ltd* [1995] BCJ No 2048; *Butler v Newfoundland (Workers’ Compensation Commission)* [1998] NJ No 190; *Bogden v Purolator Courier Ltd* [1996] AJ No 289; *Clark v Canada* [1994] 3 FC 323. These cases will be analysed in the following case review.

¹⁰ ‘An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm’. See Restatement (Third) of Torts §46 (2012).

¹¹ *Rahemtulla v Vanfed Credit Union* (n 8) at para 53 per McLachlin J.

¹² *ibid* at para 54 per McLachlin J.

¹³ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

¹⁴ *ibid* at para 77 per Lady Hale and Lord Toulson.

a category which was not mentioned in *Rhodes*, nor in other English cases. Yet in other jurisdictions it is a well-recognised type of this tort, which will be investigated independently in Chapter 5. This listing is *not* exhaustive, however. The potential modes of inflicting mental harm are many and varied, but the above are the most frequently observed.

The Canadian emphasis upon the *gravity of the conduct* seems to be consonant with (most of the) actionable cases from different jurisdictions. When determining the gravity of conduct, the *character* of the conduct, as well as its *capability* to inflict mental harm/emotional distress, are taken into consideration. Admittedly, this determination is highly reliant on context, and an element of subjectivity is inevitable.¹⁵ Nevertheless, in the case law of the different jurisdictions reviewed, five factors are frequently observed, which could be taken as *indicating* or *aggravating* the gravity of the conduct at issue. These five factors are 1) the falsity of the statement, 2) unlawful motive, 3) exploiting the victims' vulnerability, 4) abusing power or unequal status, and 5) the persistence of the wrongdoing. As will be analysed in 2.2, arguably, the first factor is particularly relevant to the first pattern of conduct. The second factor is more related to the intention/mental element than to the conduct element, thus it will be analysed in Chapter 3.¹⁶ The last aggravating factor regarding the persistence of conduct may be of less relevance in England and Scotland, since where recurrent conduct is involved, it is more likely in practice that a claimant/pursuer will pursue a remedy under the Protection from Harassment Act 1997 instead of this tort.¹⁷ As a result, in the diagram presented below, the fifth aggravating factor will not be placed into consideration, and, when constructing conduct patterns, emphasis will be placed on the first, the third, and the fourth aggravating factors – namely falsity of the statement, exploiting the victims' vulnerability, and abusing power or unequal status.

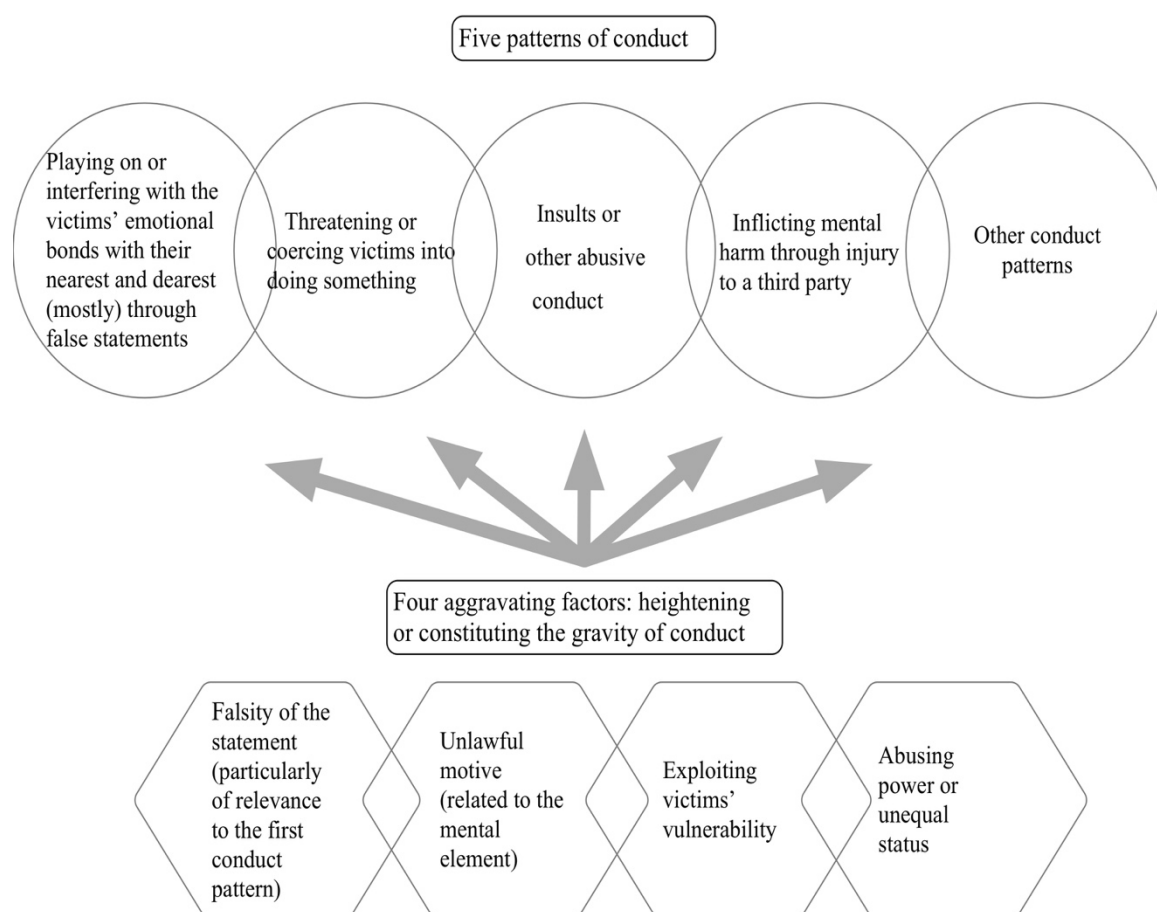
¹⁵ As pointed out by Lord Neuberger, 'even with a test of outrageousness a subjective judgment will be involved to some extent, but that cannot be avoided'. See *ibid* at para 110 per Lord Neuberger.

¹⁶ See Chapter 3, section 3.323.

¹⁷ See the analyses in sections 2.225 and 2.2252.

2.13 Construction of conduct patterns – combining different patterns with aggravating factors

Based upon the above analysis, the patterns of conduct and relevant aggravating factors can be illustrated in the following diagram:



Combining the patterns of conduct with the first, the third, and the fourth aggravating factors,¹⁸ the conduct patterns of this tort can be constructed as follows:

A. False Statement

¹⁸ Despite being relevant to the gravity of conduct, the second factor is more related to the mental element than to the conduct element.

- a. In general: Playing on or interfering with the victims' emotional bonds with their nearest and dearest (mostly) through false statements, which could significantly impact their mental well-being.
- b. Abusing power or unequal status in conjunction with playing on or interfering with the victims' emotional bonds (mostly) through false statements.

B. Threatening

- a. In general: Threatening or coercing victims into doing something, which could significantly impact their mental well-being.
- b. Exploiting the victims' vulnerability in conjunction with threats or coercion.
- c. Abusing power or unequal status in conjunction with threats or coercion.
 - a) In the context of employment: Abusing power and threatening employees with work-related negative consequences.
 - b) In other contexts: Abusing power and threatening the victims with negative consequences.

C. Insults or other abusive conduct

- a. In general: Insults or other abusive conduct, which could significantly impugn the victims' dignity and impact their mental well-being.
- b. Exploiting the victims' vulnerability in conjunction with insults or other abusive conduct.
- c. Abusing power or unequal status in conjunction with insults or other abusive conduct.
 - a) In the context of employment.
 - b) In other contexts.

D. Inflicting mental harm through injury to a third party – cases involving 'secondary victims'.

E. Other conduct patterns.

Although the first four conduct patterns are not exhaustive classifications, they

nonetheless shed light on the typical conduct patterns of this tort found to be actionable or recoverable. It should be noted that the deed done in *Rhodes v OPO* – i.e. publishing a book revealing the author’s traumatic childhood experiences – does not come close to any of these four patterns. It is theoretically possible that such conduct might constitute the conduct element as required in *Rhodes v OPO*. However, in this case the majority in the Supreme Court held that the publication at issue had not done so,¹⁹ based upon two grounds. The first was that the disputed conduct must be *directed towards/at* the claimant.²⁰ Arguably, wrongdoing can be taken as *directed at* someone when he or she is either an immediate subject (of the wrongdoing) at the scene, or at least a substantial target.²¹ In *Rhodes*, the disputed publication was considered to be directed towards ‘a wide audience’ instead of towards ‘the claimant in isolation’.²² The second ground is that publishing one’s own true life history to the world is *justifiable* conduct.²³ As analysed further in sections 2.31 and 2.312, it seems arguable that the Supreme Court treated the *absence of justification or excuse* as an integral part of the conduct element, rather than treating the presence of a *justification or excuse* as a defence.²⁴ Accordingly, since there was ‘every justification for the publication’,²⁵ the conduct element was not satisfied. Furthermore, a third reason may simply be that publishing one’s own life history to the world is *not grave* or *egregious* enough. As analysed in section 2.12, the gravity of conduct or aggravating factors can arguably be taken as a requirement in respect of this tort, as they are observed in most of the actionable cases of different jurisdictions.

In Part B (section 2.2), the first three patterns and relevant case law will be reviewed, whilst the fourth conduct pattern will be explored independently in Chapter 5.

¹⁹ *Rhodes v OPO* (n 1) at paras 80 and 90 per Lady Hale and Lord Toulson.

²⁰ *ibid* at paras 74 and 88 per Lady Hale and Lord Toulson.

²¹ Such as the plaintiff in *Bielitski v Obadiak* [1922] 65 DLR 627; the first plaintiff (Mr. Butler) in *Butler v Newfoundland (Workers’ Compensation Commission)* (n 9); or Mrs. Basham in *Stevenson v Basham* [1922] NZLR 225. For analysis of the ‘substantial target’ in this tort see Chapter 5, section 5.412.

²² *Rhodes v OPO* (n 1) at paras 74 and 75 per Lady Hale and Lord Toulson.

²³ *ibid* at paras 76 and 77 per Lady Hale and Lord Toulson.

²⁴ See sections 2.31 and 2.312. As to whether or not the Supreme Court’s approach is a warranted one, see the analysis in section 2.313.

²⁵ *Rhodes v OPO* (n 1) at para 76 per Lady Hale and Lord Toulson.

Part B

2.2 Patterns of Conduct

2.21 False Statement

2.211 In general: Playing on or interfering with victims' emotional bonds with their nearest and dearest (mostly) through false statements, which could significantly impact their mental well-being

The case of *Wilkinson v Downton* itself, can serve as the paradigm for this sort of conduct pattern. Analogous patterns of conduct can also be discerned in several cases from other jurisdictions. This pattern of conduct roughly corresponds to the 'deceptive (statement)' category suggested by *Rhodes*,²⁶ as in all of the cases the wrongdoer perpetrated the wrongdoing by means of a fabricated story. However, to tell a lie or simply to trick others cannot of itself suffice to be tortious. The nature and the essential ingredients of this conduct pattern require to be further examined.

In *Wilkinson v Downton*, deliberately to play a practical joke, the defendant falsely informed the plaintiff that her husband had been severely injured in an accident, lying somewhere 'with both legs broken'.²⁷ Through these (false) words the defendant successfully played upon the plaintiff's emotional bonds with her husband, causing her extreme anxiety and impacting her mental well-being. Wright J held the conduct of the plaintiff as 'calculated to cause physical harm' and 'to infringe her legal right to personal safety'.²⁸

In *Bielitski v Obadiak*, a Canadian case, the defendant misrepresented to another person that the son of the plaintiff 'had hanged himself from a telephone pole',²⁹ 'with

²⁶ *ibid* at para 77 per Lady Hale and Lord Toulson.

²⁷ *Wilkinson v Downton* (n 4) at 58 per Wright J.

²⁸ *ibid* at 58-59 per Wright J.

²⁹ *Bielitski v Obadiak* (n 21) at para 14 per Lamont JA.

the intention that it should reach the plaintiff'.³⁰ This untrue story had been repeated by different people and finally reached the plaintiff, as a consequence causing her 'violent shock and mental anguish, which brought on physical illness and incapacitated her for some time'.³¹

What are the crucial features of this conduct pattern? Such conduct plays on or interferes with the victims' emotional bonds with their relatives through a false story about injury or death. If the recipient believes the story, serious anxiety about the relative's death or injury is triggered, with significant consequences for his or her mental well-being. Four features should therefore be noted: *gravity*, *falsity*, *belief*, and *right to personal safety*.

First of all, trivial lies or tricks do not qualify as wrongdoing of this kind. The contents of stories fabricated in the two cases above are sufficiently serious to evoke strong emotional reactions. Wright J in *Wilkinson* held the conduct in question to be 'calculated to cause physical harm' and 'to infringe her legal right to personal safety'.³² Trivial lies or tricks would be unlikely to trigger a person's emotional reaction in such a way as to 'to infringe her legal right to personal safety'. Despite the reformulation by the Supreme Court in *Rhodes*, this still implies that conduct in this category should be of certain degree of gravity.³³ In the Canadian case *Rahemtulla v Vanfed Credit Union*, reviewed below, McLachlin J regarded the wrongdoing in *Wilkinson* as 'in fact flagrant and extreme'.³⁴

Secondly, the falsity of the defendant's statement seems to be an important factor.

³⁰ *ibid* at para 20 per Lamont JA.

³¹ *ibid* at para 14 per Lamont JA.

³² *Wilkinson v Downton* (n 4) at 58-59 per Wright J.

³³ See *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson. Although the majority made no explicit comment about 'gravity' in regard to the conduct element, they did require the mental element to be 'an intention to cause at least severe mental or emotional distress'. As will be explored in Chapter 3, the concept of intention can include *purpose* (ends or means) and *foresight with substantial certainty* (that a particular consequence would be caused by the disputed conduct). If a wrongdoer can foresee as substantially certain that his/her conduct can bring about 'severe mental or emotional distress', this foresight implies that his/her conduct should be one which is capable of causing 'severe mental or emotional distress', rather than a trivial misdemeanour.

³⁴ *Rahemtulla v Vanfed Credit Union* (n 8) at para 53 per McLachlin J.

Arguably, the falsity of the statement is neither a sufficient nor a necessary condition of this conduct pattern, but it is an aggravating factor that heightens the gravity of the wrongdoing. It is not a sufficient condition because, as mentioned above, simply telling a lie which is not too serious would not entail liability. What matters is whether the conduct or the uttered statement is grave enough to inflict severe emotional distress. On the other side of the coin, falsity is not a necessary condition of this conduct pattern either. Certainly, telling the truth is generally less reprehensible than telling lies. Yet, under exceptional circumstances, telling the truth may be taken as sufficiently egregious to constitute this conduct pattern. Let us suppose, for instance, adapting the facts of *Wilkinson*, the defendant had indeed witnessed the husband of the plaintiff being ‘smashed up in an accident’ and told her about what occurred in a callous and rude manner, deliberately trying to depict every searing detail of the accident or the severe injury resulted, *on purpose* to inflict severe emotional distress upon the plaintiff. Alternatively, A wanted to take revenge upon B, his ex-girlfriend, so he murdered her son. Then, *on purpose* to inflict severe emotional distress upon her, A phoned B and informed her of all the details as to how he did it as well as the suffering of her son before his death. In these examples, despite telling the truth, the conduct on the part of the wrongdoers is still capable of infringing the victims’ mental well-being significantly. Wrongdoing of this nature can be regarded as grave/egregious due to the presence of the wrongdoers’ unlawful motive/purpose.³⁵ Since the motive/purpose of the wrongdoers is to exploit the truth and inflict mental harm, there appears to be no reason why their conduct should escape liability just because they were communicating the truth.³⁶

Thirdly, for the false (or even true) statement to impact significantly upon the victim’s mental well-being, *the victim must believe in this story*. Clearly this *belief* is not a part of the defendant’s conduct, but it is a crucial factor connecting the defendant’s conduct to the emotional reaction on the part of the victim (claimant). Arguably, this belief

³⁵ In the absence of any unlawful motive/purpose, simply communicating true and injurious news in a callous or rude manner may not be considered as egregious enough. As to the boundary between motive and (intention based upon) purpose, see Chapter 3, section 3.323.

³⁶ Whether or not ‘truth’ can constitute justification for conduct of this tort will be further examined in section 2.3233.

should be *reasonable* from the perspective of ordinary people,³⁷ otherwise it would be difficult for the defendant to foresee the belief and the consequent emotional reaction. Although such *belief* is an indispensable element, the claimant should not be required to prove this since in most of the cases, it would be very difficult for the claimant to establish his or her subjective belief. However, in exceptional situations where the defendant can prove that the claimant did not actually believe in the disputed story, or that the claimant's belief is unreasonable, this evidence of lack of belief *may serve* to rebut the causal link between the defendant's conduct and mental harm allegedly suffered by the claimant.

Fourthly, in *Wilkinson v Downton*, Wright J spoke to the notion of a 'legal right to personal safety' by holding that '[t]he defendant has...wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety'.³⁸ Thus the 'legal right to personal safety' seems to be the interest protected by this tort.³⁹ It has been argued that the legal right to personal safety corresponds also with the interest protected by 'trespass to the person' in English law,⁴⁰ namely: 'a person's elementary civil right to security of the person, and self-determination in relation to his own body'.⁴¹ On the other hand, Lord Hoffmann stated categorically in *Wainwright v Home Office*, that '*Wilkinson v Downton* has nothing to do with trespass to the person'.⁴² Indeed, Mrs. Wilkinson had not been put in any immediate physical danger by the disputed false story. Therefore, it is not self-evident what the 'legal right to personal safety' actually means, or what the protected interest

³⁷ For instance, if a complained false statement is uttered in a heated dispute, as well as in a vague manner without provision of any definite circumstances, the belief in it may be taken as *unreasonable*. Parallel contexts see a Scottish slander case *Christie v Robertson* (1899) 1 F 1155.

³⁸ *Wilkinson v Downton* (n 4) at 58-59 per Wright J.

³⁹ It should be noted that, in Birks' opinion, *Wilkinson v Downton* 'actually turns on the right to physical integrity'. However, in his article, Birks raised a hypothetical scenario and argued that the law's focus on 'physical integrity' should be shifted to 'the right to an equality of respect' (which constitutes the protected interest of the independent tort of 'contemptuous harassment' as proposed by him). See P Birks, 'Harassment and Hubris The Right to an Equality of Respect' (1997) 32 IJNS 1 at 43-44.

⁴⁰ PR Glazebrook, 'Wilkinson v Downton: A Centenary Postscript' (1997) 32 IJNS 46 at 47-48. Also see M Lunney, 'Practical Joking and Its Penalty: Wilkinson v Downton in Context' (2002) 10 Tort L Rev 168 at 180.

⁴¹ JF Clerk and AM Dugdale, *Clerk & Lindsell on Torts* (22nd edn, 2018) para 15-01.

⁴² *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 at para 47 per Lord Hoffmann.

is for this tort. In *Wong v Parkside Health NHS Trust*, having mentioned, but not elucidated, the notion of the ‘legal right to personal safety’, Lady Justice Hale held that, in order for the requirements of the *Wilkinson* tort to be met, ‘[t]he defendant must have intended to violate the claimant’s interest in his freedom from such harm [physical harm or recognised psychiatric illness].’⁴³ The protected interest as conceptualised in that case is therefore ‘freedom from physical harm or recognised psychiatric illness’. In *Rhodes v OPO*, the *Wilkinson* tort is described by the majority in the Supreme Court as the tort of ‘wilful infringement of the right to personal safety’.⁴⁴ Nevertheless, the notion of ‘the right to personal safety’ was not clarified, nor was it expressly incorporated in the reformulation of the elements of this tort. Rather, the majority reworded the mental element as ‘an intention to cause at least severe mental or emotional distress’.⁴⁵ In the light of these decisions, although the ‘right to personal safety’ is still referred to in broad terms as the protected interest of this tort, the more specific focus has arguably been shifted to victims’ right to mental integrity, or the freedom from harm to mental well-being or mental health.

2.212 Abusing power in conjunction with playing on or interfering with victims’ emotional bonds

The impugned conduct in *Boswell v Minister of Police*,⁴⁶ a South African case, is similar to that in the above-mentioned two cases. The only difference is that the defendant in the former *abused his power or status* while he played on the plaintiff’s emotional bonds. In this case, the defendants, who were members of the police force, visited the plaintiff, who cared for her nephew Ivan since the death of his mother, and informed her that ‘he had shot Ivan who had died as a result’ and asked her to ‘go to the police station to identify the body’,⁴⁷ which turned out to be a lie.⁴⁸ The defendant

⁴³ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721; [2003] 3 All ER 932 at para 12 per Lady Justice Hale.

⁴⁴ *Rhodes v OPO* (n 1) at paras 73, 77, and 81 per Lady Hale and Lord Toulson.

⁴⁵ *ibid* at para 88 per Lady Hale and Lord Toulson.

⁴⁶ *Boswell v Minister of Police* 1978 (3) SA 268 (E).

⁴⁷ *ibid* at 270 per Kannemeyer J.

⁴⁸ *ibid* at 271 per Kannemeyer J.

was found to be aware of the plaintiff's 'close ties of kinship with Ivan',⁴⁹ yet chose to exploit it and trick the plaintiff.

The points analysed in the general part above – *gravity*, *falsity*, and *belief* are also crucial factors to be considered here. Yet the special character of this case is *the abuse of power or status* on the part of the defendant. Although communication of false information to inflict mental harm can be done by any ordinary person, the factor of abusing power/status can arguably *heighten the gravity* of the conduct at issue. As discussed, if a fabricated story (regarding the death or injury to one's nearest and dearest) is to damage an individual's mental well-being, that individual needs to have reasonable belief in the story. The position or authority enjoyed by the defendant would make his story/information more credible and, as a result, much more likely to injure. Therefore, if wrongdoing of this type is perpetrated by the defendant whilst abusing his power or position, that conduct should be taken as more egregious. In other words, *the abuse of power or status* is an *aggravating factor* for this conduct pattern.⁵⁰

2.213 The scope of this tort and the boundaries between this conduct pattern and other established torts

Finally, the boundaries between this conduct pattern and other nominate torts/delicts need to be drawn. By clarifying overlaps and differences, we can obtain a clearer understanding of the potential use of this tort, and the role it can fulfil where other torts have reached their limits. False statements are the most commonly adopted means to inflict mental harm. Yet false statements are also a feature of several other torts, such as defamation, fraud or deceit. The boundary with defamation is considered further below, as more relevant in relation to the third category of conduct pattern,⁵¹ since injured reputation is very closely related to injured dignity, and their borderline is not

⁴⁹ *ibid* at 274 per Kannemeyer J.

⁵⁰ Notably, 'whether the actor abused a position of authority over the other person' is an important consideration in determining 'whether an actor's conduct is extreme and outrageous'. See Restatement (Third) of Torts §46 (2012) (n 10) Comment d.

⁵¹ Namely, 'insults or other abusive conduct, which could significantly impugn victims' dignity and impact their mental well-being'.

always easy to identify. Comparably, the tort of deceit/fraud also requires the communication of fabricated stories or reports in order to trick the victims. As Buller J stated in *Pasley v Freeman*, a milestone case which had garnered the common law principles pertinent to dishonesty and produced the tort of deceit,⁵² '[e]very deceit comprehends a lie, but a deceit is more than a lie on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person'.⁵³ Two centuries later in *Bradford Third Equitable Benefit Building Society v Borders*, Viscount Maugham synthesised the common law rules related to deceit into four requirements:⁵⁴ 1. 'there must be a representation of fact'; 2. 'the representation must be made with a knowledge that it is false'; 3. 'it must be made with the intention that it should be acted upon by the plaintiff...in the manner which resulted in damage to him'; 4. 'it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing'. The last three requirements here help to shed light upon the boundary between the tort of deceit/fraud and the first pattern of conduct.

First of all, since '[e]very deceit comprehends a lie, but a deceit is more than a lie...',⁵⁵ it seems clear that *falsity* is a necessary (but not sufficient) condition of deceit/fraud. In contrast, for this conduct pattern, despite a false statement being a prevalently employed means to inflict mental harm, it is arguable that the *falsity* of the statement is neither a sufficient nor a necessary condition of this conduct pattern.⁵⁶ Furthermore, as can be extracted from the last two requirements, the false representation in a deceit case should be *intended to be acted on*, and then *actually acted on*, thereby resulting in the damage at issue.⁵⁷ By contrast with this, the first conduct pattern *does not require the plaintiff to act upon the false statement – namely to engage in any further*

⁵² S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, 2013) 466.

⁵³ *Pasley v Freeman* [1775-1802] All ER Rep 31 at 35 per Buller J.

⁵⁴ *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211 per Viscount Maugham.

⁵⁵ *Pasley v Freeman* (n 53) at 35 per Buller J.

⁵⁶ As analysed above, under exceptional circumstances, telling the truth can possibly constitute this conduct pattern.

⁵⁷ On the requirement of 'being acted on' of the tort of deceit, see also discussion in *Peek v Gurney* [1861-73] All ER Rep 116 at 128 per Lord Cairns; *Barry v Croskey* (1861) 70 ER 945 at 954-955 per Vice Chancellor, Sir W Page Wood.

action in reliance upon it. The first conduct pattern requires the *belief* on the part of the plaintiff in the story. As long as the plaintiff believes in the story, no further action is needed. The communication of fabricated report itself is capable of (emotionally) harming the plaintiff in a significant manner. In *Wilkinson v Downton*, Wright J apparently made this distinction. He accepted that the cost of transportation, incurred as a result of the plaintiff's action in reliance on the false message, could be recovered on the basis of *Pasley v Freeman*, since 'the statement was a misrepresentation intended to be acted on to the damage of the plaintiff'.⁵⁸ Yet the mental harm and physical harm caused to the plaintiff cannot be compensated on the same footing,⁵⁹ as 'there is no injuria of that kind'.⁶⁰

In short, where the mental harm (or even physical harm) at issue arises as a result of the victim's *believing in* the false statement rather than his/her *acting upon* it, this tort can provide a remedy which is unavailable in the field of deceit/fraud.

2.22 Threatening

2.221 In general: Threatening or coercing victims into doing something, which could significantly impact their mental well-being

Besides playing upon the victim's emotional bonds, there are other avenues through which mental well-being can be significantly harmed. The conduct pattern explored in this section centres upon threatening the victim (into doing something) with negative consequences. This corresponds to an extent with the example of 'threatening' speech mentioned in *Rhodes*,⁶¹ as the utterance or exhibition of a threat is a frequently-seen feature of this conduct pattern. The manner in which the threat is uttered, as well as the alleged negative consequences, must be sufficiently serious to harm the victim's mental well-being. In addition to the mere fact of the conduct being threatening,

⁵⁸ *Wilkinson v Downton* (n 4) at 58 per Wright J.

⁵⁹ *ibid* at 58-59 per Wright J.

⁶⁰ *ibid* at 58 per Wright J.

⁶¹ *Rhodes v OPO* (n 1) at para 77 per Lady Hale and Lord Toulson.

aggravating factors such as exploiting the victim's vulnerability or abusing power or unequal status can frequently be observed in cases of this category. These 'aggravated' cases will be explored in their own sub-categories as follows.

*Janvier v Sweeney*⁶² is a classic case where this pattern of conduct can be discerned. The plaintiff's case was that she was overcome by fright and anxiety about her own fate when she was falsely accused and threatened, in an implied fashion, with an accusation of treason. In order to procure certain letters possessed by the plaintiff's employer, one of the defendants pretended to be 'a detective inspector from Scotland Yard', deceitfully informing the plaintiff that 'she was the woman they wanted as she had been corresponding with a German spy', using threats to induce her to cooperate with them and commit a gross breach of duty.⁶³ According to Duke LJ, this case was 'much stronger' than *Wilkinson*, because in this case 'there was an intention to terrify the plaintiff for the purpose of attaining an unlawful object'.⁶⁴

The fundamental nature of this conduct pattern is using a threat to coerce the victim into doing something. This is undoubtedly different from the first conduct pattern. However, the two conduct patterns still share some important features. First of all, if *Janvier v Sweeney* can be taken as an archetypal case of this category, the disputed conduct requires to be grave. As observed by McLachlin J, the conduct pattern of *Janvier v Sweeney* can be regarded as 'flagrant and extreme'.⁶⁵ Trivial threats which are incapable of significantly impacting the victim's mental well-being may not attract liability. In other words, the threatened consequences and the manner in which the threat is uttered must be serious and frightening to a high degree.

Secondly, *falsity* is not a necessary characteristic of this conduct pattern. Although the defendant in *Janvier* threatened the plaintiff on the basis of a fabricated story, in most of the cases of this category there is no false statement. As threats in general can be based upon true facts, a false statement is not an indispensable element of threatening

⁶² *Janvier v Sweeney* [1919] 2 KB 316.

⁶³ *ibid* at 320-321 per Bankes LJ; also at 316-317.

⁶⁴ *ibid* at 326 per Duke LJ.

⁶⁵ *Rahemtulla v Vanfed Credit Union* (n 8) at para 53 per McLachlin J.

behaviour. Furthermore, it is doubtful whether the falsity of the statement can be taken as an aggravating factor in this conduct pattern. Arguably, threats based upon true facts may often be more intimidating. For instance, if everything uttered by the defendant in *Janvier* was true, and the plaintiff knew it to be so, the threat at issue might have been even more frightening, and capable of harming the plaintiff's mental integrity in a significant manner.⁶⁶

Thirdly, if the plaintiff is to be intimidated and damaged emotionally, the plaintiff needs to have reasonable belief in the defendant's story, as well as in the prospect that the defendant would carry out the threat. However, the plaintiff does not need to take positive action in compliance with the threat. In *Janvier v Sweeney*, the disputed threat on the part of the defendant had impacted the plaintiff's mental well-being in a significant way, even incapacitated her, before she could do anything in response to the threat.

Lastly, the defendant's *unlawful motive*, or 'purpose of attaining an unlawful object'⁶⁷ can be observed in *Janvier*, which would arguably aggravate the wrongdoing/conduct at issue. As this aggravating factor is intertwined with the notions of *motive* and *intention based upon purpose (ends or means)*, it will be explored in Chapter 3.⁶⁸

2.222 Exploiting the victim's vulnerability in conjunction with threats or coercion

The three cases analysed in this part are all from Canada. A common characteristic in each case is that the defendant *exploited or played on* others' *vulnerability* when the disputed conduct (threat) was committed. In *Timmermans v Buelow*, with the knowledge of the plaintiff's previous psychiatric condition,⁶⁹ his landlord Buelow, kept threatening the plaintiff that he would put the latter back into the hospital,⁷⁰ in

⁶⁶ As to whether truth-based threatening can be justified, see the discussion in sections 2.3222 and 2.3233.

⁶⁷ *Janvier v Sweeney* (n 62) at 326 per Duke LJ.

⁶⁸ See Chapter 3, section 3.323.

⁶⁹ *Timmermans v Buelow* [1984] OJ No 2408 at paras 18 and 31 per Catzman J.

⁷⁰ *ibid* at para 15 per Catzman J.

order to ‘play on the plaintiff’s fears and to induce him to vacate the [rented] premises immediately’.⁷¹ The second case, *Pacific Press v C E P, Local 115-M*, is a case of a grievance filed by a trade union to the Labour Arbitration Board against an employer. Despite having knowledge of the poor health and vulnerable mental state of the employee, the employer’s staff repeatedly threatened her that unless she resumed work she would be disciplined,⁷² In addition, they denied her claim for disability benefits without reasonable grounds for doing so.⁷³ This conduct was appraised as flagrant and extreme.⁷⁴ In the third case, *Boothman v R*, the plaintiff was threatened with losing her job, and suffered deliberate assaults, harassment, and insults. In this case, the plaintiff’s supervisor perceived her emotional fragility and determined to exploit it⁷⁵ by constant threats and insults.⁷⁶ This conduct was held to have generated ‘extreme emotional reactions’.⁷⁷

As can be discerned from these three cases, knowledge of the plaintiff’s vulnerability and exploitation of this vulnerability appear to be the shared features of the disputed conduct. Parallel to abusing power or status, in accordance with the commentary to the Restatement (Third) of Torts §46, having knowledge of (and exploiting) the victim’s vulnerability is also a crucial consideration when assessing ‘whether an actor’s conduct is extreme and outrageous’.⁷⁸ This is without doubt an important aggravating factor, which does not merely heighten the gravity of the defendant’s conduct, but may even transform otherwise non-tortious into tortious conduct.⁷⁹ In other words, the wrongdoer’s knowledge and exploitation of the victim’s vulnerability may render normally harmless conduct harmful (specifically to this victim). Also, this knowledge

⁷¹ *ibid* at paras 18 and 30 per Catzman J.

⁷² *Pacific Press v C E P, Local 115-M* (n 9) at paras 94-95 per Bruce.

⁷³ *ibid* at paras 96-97 per Bruce.

⁷⁴ *ibid* at para 98 per Bruce.

⁷⁵ *Boothman v R* [1993] 3 FC 381 at para 98 per Noël J.

⁷⁶ *ibid* at para 76 per Noël J.

⁷⁷ *ibid*.

⁷⁸ Restatement (Third) of Torts §46 (2012) (n 10) Comment d.

⁷⁹ Accepting the principle that ‘[c]onduct which would not cause nervous shock to a normal person should not be regarded as tortious’, Noël J held that ‘[w]hen a person knowingly exploits another’s emotional and mental vulnerability thereby causing a severe and lasting mental breakdown, it is no answer to state that a normal person would not have been so adversely affected.’ See *Boothman v R* (n 75) at paras 101 and 106 per Noël J.

(of vulnerability) can play a role in determining the wrongdoer's level of intention⁸⁰ – at least in the form of *knowledge/foresight with substantial certainty* that his or her conduct would cause mental harm to this specific victim.⁸¹

The feature of heightening the gravity of the wrongdoer's conduct can be observed in *Boothman v R*. The various forms of conduct in *Boothman* – including threatening the victim with loss of her job – should be sufficiently serious to impact employees' mental well-being in a significant way, irrespective of whether the employees are *of normal fortitude*.⁸² In contrast, in *Timmermans v Buelow*, generating an atmosphere of 'tension and confrontation',⁸³ threatening to 'put the plaintiff's stuff out on the street'⁸⁴ and put the plaintiff 'back in the hospital'⁸⁵ might be unpleasant and annoying. Yet whether these deeds can significantly harm the mental well-being of people *of normal fortitude* is questionable. The knowledge and exploitation of the plaintiff's specific vulnerability played a crucial role here to trigger liability, *transforming the defendant's deeds into tortious and actionable ones*. This interpretation seems to be consistent with Catzman J's conclusion, that 'Buelow's actions on October 1, 1981, given his prior knowledge of the plaintiff's condition, involve him in legal responsibility for the damages suffered by the plaintiff as a result'.⁸⁶

2.223 Abusing power or unequal status in conjunction with threats or coercion

The characteristic shared by cases of this category is that the defendant abused power

⁸⁰ 'If I am aware that a person is vulnerable to a particular form of conduct and I persist in that form of conduct, the fact I do so demonstrates the intentional aspects of my acts.' See *Bogden v Purolator Courier Ltd* (n 9) at para 81 per Ritter J.

⁸¹ Regarding this form/level of intention, see Chapter 3, section 3.4.

⁸² Notably, this issue had not been addressed in *Boothman*. Since Mr. Stalinski had exploited the mental fragility on the part of the plaintiff, there is no question as regards 'whether the actions of Mr. Stalinski would have caused nervous shock to a normal person'. See *Boothman v R* (n 75) at para 106 per Noël J.

⁸³ *Timmermans v Buelow* (n 69) at para 14 per Catzman J.

⁸⁴ *ibid* at para 12 per Catzman J.

⁸⁵ *ibid* at para 15 per Catzman J.

⁸⁶ *ibid* at para 31 per Catzman J.

or unequal status in committing the impugned conduct (threat). As many cases of this type have emerged in the context of employment, this category will be further split into two sub-categories – cases in the context of employment and cases in other contexts.

2.2231 In the context of employment: Abusing power and threatening victims with loss of employment or other work-related negative consequences

In this sub-category, the defendant can issue threats or indulge in other injurious conduct mainly because he or she enjoyed a superior position of authority at work. In nearly all of the cases reviewed here, the defendant did not exercise his power or authority for a legitimate purpose or in an appropriate manner. Therefore, the conduct pattern of this sub-category can be seen as a combination of the abuse of power and threats. The threats may be varied in nature, but they must be germane to work-related conditions. For instance, the gist of the threat may be about disciplinary measures taken against the victim. In *Pacific Press v C E P, Local 115-M*, noted above, whilst threatening the employee with disciplinary procedures⁸⁷ and rejecting without reasonable ground her claim for disability benefits,⁸⁸ the employer did not merely exploit her fragility but also abused the employer's power or authority. Alternatively, the threat may be related to an unwanted transfer or termination of employment. In the *Boothman v R*, mentioned above, the plaintiff's supervisor repeatedly uttered threats and insults against her, threatening that she could be dismissed.⁸⁹ His conduct not only exploited her vulnerability but also abused his superior authority.

Other patterns of abusive and threatening conduct include the following examples:

- phoning an injured and unwell employee persistently,⁹⁰ fabricating information from her doctor and insinuating that she was malingering,⁹¹ and threatening

⁸⁷ *Pacific Press v C E P, Local 115-M* (n 9) at para 95 per Bruce.

⁸⁸ *ibid* at paras 96-97 per Bruce.

⁸⁹ *Boothman v R* (n 75) at para 76 per Noël J.

⁹⁰ *Prinzo v Baycrest Centre for Geriatric Care* (n 9) at para 6 per Weiler JA.

⁹¹ *ibid* at para 8 per Weiler JA.

her that she would be disciplined for refusing to return to work⁹² (*Prinzo v Baycrest Centre for Geriatric Care*);⁹³

- in addition to physical abuse and threats of physical harm,⁹⁴ repeatedly insulting the employee in a serious manner,⁹⁵ threatening him with ‘loss of his job’,⁹⁶ and stopping his salary,⁹⁷ or a transfer from his current position⁹⁸ (*Nationwide News Pty Ltd v Naidu*);⁹⁹
- making an unfounded accusation (of theft) against the employee,¹⁰⁰ threatening her with the loss of her job,¹⁰¹ and actually dismissing her thereafter¹⁰² (held by McLachlin J as ‘flagrant and outrageous’¹⁰³ as well as reflecting an abuse of power¹⁰⁴ in *Rahemtulla v Vanfed Credit Union*);¹⁰⁵
- in order to achieve an unlawful goal, repeatedly threatening the employee that unless he cooperated and ‘reconsidered his position’,¹⁰⁶ he would lose his job,¹⁰⁷ warning him that the defendant had ‘black contacts in Hong Kong’,¹⁰⁸ and actually dismissing him without reasonable ground¹⁰⁹ (*Campbell v Wellfund Audio-Visual Ltd*);¹¹⁰

⁹² *ibid* at para 11 per Weiler JA.

⁹³ These wrongdoings on the part of the defendant prior to the termination were held as ‘flagrant and outrageous’ by the court. See *ibid* at para 60 per Weiler JA.

⁹⁴ *Nationwide News Pty Ltd v Naidu* (n 7) at paras 118-119 per Beazley JA.

⁹⁵ *ibid* at paras 117 and 128 per Beazley JA.

⁹⁶ *ibid* at para 134 per Beazley JA.

⁹⁷ *ibid* at para 137 per Beazley JA.

⁹⁸ *ibid* at para 117 per Beazley JA.

⁹⁹ The wrongdoings on the part of the wrongdoer were held as parallel to the character of the *Wilkinson* tort and as a consequence recoverable. See *ibid* at paras 67 and 83 per Spigelman CJ.

¹⁰⁰ *Rahemtulla v Vanfed Credit Union* (n 8) at paras 3 and 4 per McLachlin J.

¹⁰¹ *ibid* at para 4 per McLachlin J.

¹⁰² *ibid* at paras 4-5 per McLachlin J.

¹⁰³ *ibid* at para 55 per McLachlin J.

¹⁰⁴ ‘While the financial institution has the right to dismiss a suspect employee without investigation, the proper conduct of its affairs does not require that it be given the right to make reckless and very possibly untruthful accusations as to the employee’s honesty which will foreseeably inflict shock and mental suffering.’ See *ibid*.

¹⁰⁵ This is a pivotal case in relation to the *Wilkinson* tort in Canadian case law. See D Réaume, ‘The Role of Intention in the Tort in *Wilkinson v Downton*’ in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (2007) 533 at 546-548.

¹⁰⁶ *Campbell v Wellfund Audio-Visual Ltd* (n 9) at para 32 per Clancy J.

¹⁰⁷ *ibid* at para 38 per Clancy J.

¹⁰⁸ *ibid* at para 36 per Clancy J.

¹⁰⁹ *ibid* at para 46 per Clancy J.

¹¹⁰ The wrongdoings of the defendant were held by Clancy J as flagrant and extreme. See *ibid* at para 104 per Clancy J.

- in addition to a course of harassment,¹¹¹ threatening the plaintiff with the loss of her job,¹¹² as well as with criminal investigation and charges¹¹³ (*Clark v Canada*).¹¹⁴

In short, the common characteristic of the above cases is that the wrongdoer threatened the plaintiff/employee with work-related negative consequences by exploiting his or her superior position, authority, or power: '[t]he combatants are not equals'.¹¹⁵ Namely, the wrongdoer's control over the prospective well-being of the threatened employee, made the threatening conduct more harmful and egregious. In one Canadian arbitration case, it was held that the employer's authority heightened the gravity of otherwise common behaviour such as yelling, screaming, or heated arguments, potentially converting them into extreme and outrageous conduct.¹¹⁶

In addition, it can be observed in most of the Canadian or Australian cases reviewed in the employment context, the impugned 'conduct' encompassed multiple actions rather than a single act. A threatening conduct pattern commonly occurred alongside insulting behaviour. Although these foreign cases help to shed light on the conduct patterns of this tort, in England and Scotland wrongdoing that recurs and meets the requirement of 'a course of conduct'¹¹⁷ can be dealt with on the basis of the Protection from Harassment Act 1997. Therefore the boundary between this conduct pattern (or even this tort) and the statutory tort of harassment requires to be clarified. The boundary issue will be examined after the next section.

¹¹¹ *Clark v Canada* (n 9) at paras 5-8 per Dubé J.

¹¹² *ibid* at para 17 per Dubé J.

¹¹³ *ibid* at paras 26-27 per Dubé J.

¹¹⁴ These multiple wrongdoings were held by Dubé J as 'extreme'. See *ibid* at para 65 per Dubé J.

¹¹⁵ *Tyee Village Hotel v Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40 57 CLAS 124* at para 34 per Albertini.

¹¹⁶ *ibid* at paras 12, 13, 34, 43, and 44 per Albertini. It was held at para 34, that 'Harper appears to simply not understand that a person in authority cannot engage in a heated argument with an employee with impunity...The combatants are not equals'.

¹¹⁷ See Protection from Harassment Act 1997 s 8(1) and s 1(1).

2.2232 In other contexts: possessing superior power/authority and threatening people with negative consequences

Possession of superior authority or power in combination with threatening acts can also be seen in contexts other than employment. For instance, public officers and in particular the police and those involved in law enforcement may be seen as enjoying a form of superior power/authority. Based on that authority the wrongdoer can utter a threat, or make a threat more egregious and harmful. In *Murray v Prevost*, a Canadian case, the defendant was then a police officer,¹¹⁸ who threatened the plaintiff that he would take her child away,¹¹⁹ and that he would ‘fuck up [her] driving record’.¹²⁰ The court held that these threats were ‘actionable’ in consideration of ‘the position of the Defendant as a police officer’.¹²¹ In another Canadian case, *Butler v Newfoundland (Workers’ Compensation Commission)*, the first plaintiff was an injured worker and the second plaintiff was his wife, who acted as the advocate for the worker throughout a claim process.¹²² In the course of that process, without any foundation, the C.E.O. of the compensation commission insulted the wife and condemned her for her continuous interference with medical appraisals, threatening the plaintiffs with ‘negative impact on the decision making process’.¹²³ The defendant’s conduct through its C.E.O. was held as ‘flagrant and extreme’.¹²⁴ Obviously the impugned conduct in this case was regarded as so egregious because the defendant possessed superior power and authority. Conversely, it is possible that in the absence of the imbalance of power or authority, the disputed conduct on the part of the defendant may not be regarded as so serious as to be actionable.

¹¹⁸ *Murray v Prevost* 2006 CarswellOnt 7522 at para 2 per JM Young DJ.

¹¹⁹ *ibid* at para 5 per JM Young DJ.

¹²⁰ *ibid*.

¹²¹ *ibid*. (The numbers of paragraphs are lost in this decision after para 5).

¹²² *Butler v Newfoundland (Workers’ Compensation Commission)* (n 9) at paras 1 and 89 per Russell J.

¹²³ *ibid* at para 77(6) per Russell J.

¹²⁴ *ibid* at paras 93 and 102 per Russell J.

2.224 The boundary between this conduct pattern and assault

2.2241 The characteristics of assault

The feature of threats in respect of this conduct pattern can possibly be compared with the characteristics (or a part of the characteristics) of *assault*. In English law, under the head of ‘trespass to the person’, the tort of assault is distinguished from the tort of battery.¹²⁵ Goff LJ elucidated the distinction succinctly in *Collins v Wilcock*, that an assault is ‘an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person’, whilst a battery is ‘the actual infliction of unlawful force on another person’.¹²⁶ The infliction of unlawful force does not need to bring about any physical harm. It can be satisfied by any unwanted and ‘hostile’ touching,¹²⁷ any physical contact which goes ‘beyond generally acceptable standards of conduct’,¹²⁸ or any touching which can be taken as ‘offensive/objectionable’.¹²⁹ The substance of assault is ‘an act causing reasonable apprehension of a battery’.¹³⁰ The reasonable apprehension can be generated by various forms of conduct, possibly even by silent phone calls, by analogy with the decision in *R v Ireland*.¹³¹ Despite its being a criminal case, the House of Lords’ interpretation of the elements of assault therein might equally be applied to tortious liability also.¹³² Lord Hope acknowledged that silent phone calls, despite conveying no words or gestures at all, are capable of precipitating ‘an apprehension of immediate and unlawful violence’.¹³³ Lord Steyn also held that the apprehension of ‘the *possibility* of immediate personal violence’, resulting from the silent calls, could meet the requirement of assault.¹³⁴ However, it seems that an apprehension unrelated to physical violence, force or contact cannot be

¹²⁵ See Clerk and Dugdale (n 41) Chapter 15.

¹²⁶ *Collins v Wilcock* [1984] 1 WLR 1172 at 1177 per Goff LJ.

¹²⁷ *Wilson v Pringle* [1987] QB 237 at 252-253 per Croom-Johnson LJ.

¹²⁸ *Collins v Wilcock* (n 126) at 1178 per Goff LJ.

¹²⁹ See PR Glazebrook, ‘Assaults and Their Consequences’ (1986) 45(3) CLJ 379 at 380-381.

¹³⁰ Clerk and Dugdale (n 41) para 15-13.

¹³¹ *R v Ireland* [1998] AC 147.

¹³² E Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010) para 2.16.

¹³³ *R v Ireland* (n 131) at 166 per Lord Hope of Craighead.

¹³⁴ *ibid* at 162 per Lord Steyn.

protected by the law of assault. Whether this gap can be filled by this tort will be discussed further below (in section 2.2242).

In contrast, this demarcation between assault and battery has gradually retreated from the modern outlook of Scots law.¹³⁵ The terminological usage of ‘assault’ in current Scots law incorporates both the infliction of physical injury/contact and the threat of it. In principle, a remedy based upon assault may be recognised in situations where physical injury or bodily contact is inflicted,¹³⁶ or in cases where physical injury or bodily contact is threatened.¹³⁷ The first kind of assault can be committed either by ‘direct physical contact’ or ‘by causing an object to make such contact’, which must be ‘objectionable and offensive’ instead of being ‘trivial’.¹³⁸ In the second category, an assault can be committed by the wrongdoer putting the victim in ‘immediate fear of hostile or objectionable physical contact’.¹³⁹ As the original essence of assault in Scots law could be taken as ‘insult’ or ‘affront’ to others,¹⁴⁰ a third sub-division of assault was suggested by Walker. Under this category, labelled by Walker as ‘indirect assault’, an act done deliberately to result in another person’s ‘being affronted’ – e.g. taking away his clothes, or being ‘put in a state of alarm’, or ‘physically hurt’, is ‘doubtless equally an assault’.¹⁴¹ However, after a thorough examination, Reid observed that there is little authority in the modern Scots cases to support this third category of assault as proposed by Walker, since ‘[t]here are no findings of assault on the basis of soiled towels or other affronts to dignity without the presence of some

¹³⁵ F McManus, E Russell and J Bisacre, *Delict: A Comprehensive Guide to the Law in Scotland* (2nd edn, 2011) para 13.3. Reid (n 132) para 2.04. With regard to the emergence and establishment of assault, see J Blackie, ‘Unity in Diversity: The History of Personality Rights in Scots Law’ in NR Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 31 at 104-108.

¹³⁶ *Downie v Chief Constable, Strathclyde Police* 1998 SLT 8 at 8-9 per Lord Bonomy.

¹³⁷ *Hyslop v Staig* (1816) 1 Mur 15 at 22 per Lord Chief Commissioner. Also see *Ewing v Earl of Mar* (1851) 14 D 314. In this case, the assault charged is twofold, besides ‘spitting’ the defender also rode on horseback at the pursuer, so as to place the latter in danger.

¹³⁸ Reid (n 132) para 2.05.

¹³⁹ *ibid* para 2.15. Also see *Hyslop v Staig* (n 137) at 22 per Lord Chief Commissioner: ‘It is not necessary in law to constitute an assault, that the person be struck. It is sufficient that he has been put in dread or apparent danger of bodily harm.’

¹⁴⁰ G Cameron, *Delict* (5th edn, 2019) para 4-17; or page 83 in the fourth edition. Also see DM Walker, *The Law of Delict in Scotland* (2nd rev edn, 1981) 488-490.

¹⁴¹ Walker (n 140) 492.

element of contact or threatened physical danger.’¹⁴² In other words, an insult or affront, without the pursuer being physically hurt, touched, or threatened, is unlikely to found a solid claim in the area of assault. Nevertheless, this type of insult may be remedied on the basis of this tort, as will be explored in section 2.23.

2.2242 Comparison between assault and the second conduct pattern of this tort

A comparison between assault and the second conduct pattern of the tort discussed here reveals the points at which the law of assault may draw back but this tort might still apply. It would appear that assault in English law, or the second category of assault in Scots law – namely causing apprehension of ‘immediate’ and ‘unlawful’ force¹⁴³ or ‘immediate fear of hostile or objectionable physical contact’,¹⁴⁴ can be compared to the second conduct pattern discussed in this section. Where an assault is perpetrated by means of a threat or threatening conduct, what is the distinction between such an assault and the threatening conduct of this tort?

From the above analysis of the features of assault, it is obvious that in regard to assault threats require to involve *physical injury, force, or contact*. In other words, the expected bad consequence – injury or contact – relates to the victim’s physical integrity, and the apprehended injury, force, or contact must be hostile, offensive, or objectionable. In contrast, the negative consequences threatened in respect of the second conduct pattern (of the tort discussed here) can be of all sorts *including but certainly not restricted to* physical injury, force, or contact. They do not require to be immediate or imminent, yet they need to be sufficiently serious and gratuitous to invade the victim’s mental integrity or mental well-being.

In the cases reviewed above, the *threat of assault* can be seen in *Boothman v R* and in *Nationwide News Pty Ltd v Naidu*. In *Boothman v R*, in addition to threats as to work-

¹⁴² Reid (n 132) para 2.20.

¹⁴³ *Collins v Wilcock* (n 126) at 1177 per Goff LJ.

¹⁴⁴ Reid (n 132) para 2.15.

related consequences, the plaintiff's supervisor had made several threats such as 'he wanted to shove his fist down plaintiff's throat', 'he would break her fingers', 'he would rip off her lips', and 'he would break her arm and that he would bash her head in'.¹⁴⁵ Whilst uttering these threats, he would occasionally display a hammer or brandish a screwdriver in the presence of the plaintiff.¹⁴⁶ These threats were without doubt targeted at the plaintiff's physical integrity. In a parallel manner, apart from threats concerning work-related consequences, in *Nationwide News Pty Ltd v Naidu* one of the defendant's senior officers repeatedly made threats to the plaintiff regarding what he would do to him. He had 'punched a hole in a wall' and said 'this is what I'm going to do to you',¹⁴⁷ once in a while intimidating him with '[kicking] chairs and [throwing] things', warning him that if he dared to leave he 'would never be able to walk'.¹⁴⁸ Such threats are also of a physical character and capable of constituting assault. In contrast with these examples, other threats discussed above under this second category are *non-physical*, such as the threat to put the victim out of work, as occurred in *Rahemtulla v Vanfed Credit Union*,¹⁴⁹ in *Campbell v Wellfund Audio-Visual Ltd*,¹⁵⁰ and also in *Boothman v R*¹⁵¹ and in *Nationwide News Pty Ltd v Naidu*.¹⁵² Threats of a non-physical nature also include the horrifying consequences of being charged with treason following from the threats made in *Janvier v Sweeney*;¹⁵³ the threat to send the victim back to hospital in *Timmermans v Buelow*;¹⁵⁴ or threats to deprive the victims of their sole financial support as in *Butler v Newfoundland (Workers' Compensation Commission)*.¹⁵⁵

In sum, a boundary can possibly be drawn between the threat of assault and the threat of this second conduct pattern. Where the threatened consequences involve *no* physical

¹⁴⁵ *Boothman v R* (n 75) at para 74 per Noël J.

¹⁴⁶ *ibid* at para 75 per Noël J.

¹⁴⁷ *Nationwide News Pty Ltd v Naidu* (n 7) at para 119 per Beazley JA.

¹⁴⁸ *ibid* at para 123 per Beazley JA.

¹⁴⁹ *Rahemtulla v Vanfed Credit Union* (n 8) at para 4 per McLachlin J.

¹⁵⁰ *Campbell v Wellfund Audio-Visual Ltd* (n 9) at para 38 per Clancy J.

¹⁵¹ *Boothman v R* (n 75) at para 76 per Noël J.

¹⁵² *Nationwide News Pty Ltd v Naidu* (n 7) at para 134 per Beazley JA.

¹⁵³ *Janvier v Sweeney* (n 62) at 320-321 per Bankes LJ; also at 316-317.

¹⁵⁴ *Timmermans v Buelow* (n 69) at para 15 per Catzman J.

¹⁵⁵ *Butler v Newfoundland (Workers' Compensation Commission)* (n 9) at paras 77(6) and 91 per Russell J.

injury, force, or contact, the law of assault would reach its limits. Yet the tort under discussion here may nonetheless provide a remedy.

2.225 The boundary between this conduct pattern and harassment

As discussed above this second conduct pattern typically involves multiple actions rather than a single act – especially in the context of employment. Also, this conduct pattern of threats is often intermingled with other conduct patterns. The variety of conduct is reminiscent of the statutory tort of harassment. Admittedly most of the decisions under review are from Canada or Australia. In Canada, tortious liability in respect of harassment is contentious,¹⁵⁶ or at least the situation is divided and unsettled.¹⁵⁷ In Australia, the tort of harassment is similarly uncertain, as noted by the Australian Law Reform Commission.¹⁵⁸ As a result, in these two jurisdictions, wrongdoing in the form of *harassment* can be dealt with by reference to the *Wilkinson* tort. In contrast, in England and Scotland, pursuant to the Protection from Harassment Act 1997, ‘a course of conduct’ inflicting alarm, anxiety or distress constitutes actionable harassment. Hence as long as multiple actions are involved the requirements for statutory harassment are likely to be met. But are multiple actions of this conduct pattern (or this tort) fully covered by the 1997 Act? In order to answer this question, the characteristics of harassment require some exploration.

¹⁵⁶ See *Campbell v Wellfund Audio-Visual Ltd* (n 9) at para 93 per Clancy J. In this case, Clancy J stated that ‘I was provided with no authority that establishes harassment as a cause of action in Canada’.

¹⁵⁷ *Mainland Sawmills Ltd v IWA-Canada, Local 1-3567 Society* 2006 BCSC 1195 at paras 13-14 per J S Prowse J. As J S Prowse J pointed out, ‘The case law is divided’. However, even some cases ‘have assumed that the tort of harassment exists’, they ‘do not set out the basis for that assumption, nor do they set out the elements of the tort’.

¹⁵⁸ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (ALRC No 123, 2014) para 15.12. In terms of civil remedies, ‘Australian courts have not recognised a common law cause of action for harassment’.

2.2251 The requirements and nature of *harassment*

The Protection from Harassment Act 1997 addresses courses of conduct that inflict alarm, anxiety and emotional distress. In accordance with section 1(1) of the Act, which applies in England and Wales: ‘(1) A person must not pursue a course of conduct – (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.’¹⁵⁹ In regard to Scotland, with a slightly different wording, section 8(1) provides that ‘Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and (a) is intended to amount to harassment of that person; or (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.’¹⁶⁰ ‘Conduct’ encompasses speech and ‘harassment’ includes causing the person alarm or distress.¹⁶¹ A course of conduct must involve conduct on at least two occasions,¹⁶² save exceptions provided in section 7(3)(b) for England and Wales¹⁶³ and section 8A(3)(b) for Scotland.¹⁶⁴ Notwithstanding the foremost purpose of this Act being regarded as ‘prevention and protection rather than compensation’,¹⁶⁵ in England/Wales and Scotland, the court may award damages which cover any ‘anxiety caused by the harassment’ and any ‘financial loss resulting from the harassment’.¹⁶⁶ To prevent the wrongdoer from pursuing any further conduct constituting harassment, the English/Welsh court can grant an injunction against the wrongdoer,¹⁶⁷ whilst the Scottish court can grant an interdict or a non-harassment order.¹⁶⁸ Besides civil remedies, harassment in England

¹⁵⁹ Protection from Harassment Act 1997 s 1(1).

¹⁶⁰ *ibid* s 8(1).

¹⁶¹ *ibid* s 7(2), (4) in relation to England and Wales; s 8(3) in regard to Scotland.

¹⁶² *ibid* s 7(3)(a) in relation to England and Wales; s 8(3) in regard to Scotland.

¹⁶³ *ibid* s 7(3)(b). In England and Wales, according to section 7(3)(b), ‘in the case of conduct in relation to two or more persons (see section 1(1A))’, a course of conduct must involve ‘conduct on at least one occasion in relation to each of those persons’.

¹⁶⁴ *ibid* s 8A(3)(b). In Scotland, where the disputed harassment constitutes ‘domestic abuse’, the required conduct ‘may involve behaviour on one or more than one occasion’.

¹⁶⁵ *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at paras 65 and 67 per Baroness Hale of Richmond. Please also see T Lawson-Cruttenden and N Addison, *Blackstone's Guide to the Protection from Harassment Act 1997* (1997) 30.

¹⁶⁶ Protection from Harassment Act 1997 s 3(2) in relation to England and Wales; s 8(5), (6) in regard to Scotland.

¹⁶⁷ *ibid* s 3(3), 3(6), 3A.

¹⁶⁸ *ibid* s 8(5)(b).

and Wales is also a criminal offence,¹⁶⁹ whereas the commission of harassment in Scotland is not per se a crime, although the breach of a non-harassment order in Scotland would constitute a criminal offence.¹⁷⁰

It is suggested that the legislation of Protection from Harassment Act was originally aimed at putting an end to ‘stalking’ and ‘neighbours from hell’.¹⁷¹ This might have been the impetus for the legislation, but the 1997 Act is drafted in a sufficiently broad way to cover much else besides. The width of protection offered by this Act was exemplified in *Majrowski v Guy’s and St Thomas’s NHS Trust*, where Lord Nicholls submitted that ‘[t]he Act seeks to provide protection against stalkers, racial abusers, disruptive neighbours, bullying at work and so forth.’¹⁷² In this case, the House of Lords unanimously held that the employer could be vicariously liable for the harassing conduct perpetrated by their employees, as long as the requirement of ‘close connection’ (between the complained harassment and the employment) was met.¹⁷³

In an intended rather than inadvertent manner, the ‘definition of harassment’ seemed to be left ‘wide and open-ended’ in the 1997 Act.¹⁷⁴ Despite the absence of an exact definition, Lord Nicholls in *Majrowski* proposed a standard for determining whether the disputed course of conduct can be considered as harassment – ‘oppressive and unacceptable (behaviour)’,¹⁷⁵ whereas Lady Hale embraced similar terms of ‘offensive and unacceptable behaviour’.¹⁷⁶ Harassment is, however, to be

¹⁶⁹ *ibid* s 2.

¹⁷⁰ *ibid* s 9.

¹⁷¹ K Patten, ‘Defining Harassment’ (2010) 160 NLJ 331 at 331. Also see P Giliker, ‘The Ongoing March of Vicarious Liability’ (2006) 65 CLJ 489 at 490; C Bryden, ‘Unreasonable Conduct’ (2010) 160 NLJ 198 at 199; *Veakins v Kier Islington Ltd* [2009] EWCA Civ 1288 at para 17 per Lord Justice Maurice Kay.

¹⁷² *Majrowski v Guy’s and St Thomas’s NHS Trust* (n 165) at para 18 per Lord Nicholls.

¹⁷³ *ibid* at para 30 per Lord Nicholls. As regards the ‘close connection’ test in respect of vicarious liability, see *Lister v Hesley Hall Ltd* [2002] 1 AC 215. Analyses pertinent to vicarious liability in the area of harassment, see Reid (n 132) para 4.06. Also see NA Moreham, ‘Harassment by Publication’ in NA Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, 2016) 269 at paras 6.25 and 6.26.

¹⁷⁴ *Majrowski v Guy’s and St Thomas’s NHS Trust* (n 165) at para 66 per Baroness Hale of Richmond. Also see Patten (n 171) at 331.

¹⁷⁵ *Majrowski v Guy’s and St Thomas’s NHS Trust* (n 165) at para 30 per Lord Nicholls.

¹⁷⁶ *ibid* at para 66 per Baroness Hale of Richmond.

distinguished from ‘ordinary banter and badinage of life’,¹⁷⁷ or conduct that is ‘unattractive’, ‘regrettable’, even ‘unreasonable’.¹⁷⁸ In other words, the ‘gravity of the misconduct’ is required to cross the dividing line and satisfy the proposed standard.¹⁷⁹

2.2252 The demarcation between harassment and this conduct pattern

Where the disputed wrongdoing, which (intentionally) inflicts alarm, distress, or even mental harm, occurs on only one occasion, in most cases it cannot be dealt with on the basis of the Protection from Harassment Act 1997. Actionable harassment requires a course of conduct which involves conduct on at least two occasions,¹⁸⁰ unless the wrongdoing at issue relates to multiple victims (harassed by the same wrongdoer) in England/Wales¹⁸¹ or amounts to ‘domestic abuse’ in Scotland.¹⁸² As a result, the tort under discussion here continues to have practical relevance where the wrongdoing has occurred on one occasion only.¹⁸³

However, where the alleged infliction of alarm, distress, or mental harm involves multiple deeds, the boundary between this conduct pattern (or this tort) and harassment becomes less clear, since the definition of harassment is left ‘wide and open-ended’.¹⁸⁴ The standard of ‘oppressive’, ‘offensive’, and ‘unacceptable’ behaviour as proposed in *Majrowski* can be construed by different courts in various ways. ‘Oppressive’ is perhaps more specific and implies gravity, but ‘offensive and unacceptable’ are very general terms used in depicting tortious conduct. As Lady Hale acknowledged in

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid* at para 30 per Lord Nicholls.

¹⁷⁹ *ibid.* Regarding the ‘seriousness of the defendant’s conduct’, also see Moreham, ‘Harassment by Publication’ (n 173) at paras 6.21 and 6.22.

¹⁸⁰ Protection from Harassment Act 1997 s 7(3)(a) in relation to England and Wales; s 8(3) in regard to Scotland.

¹⁸¹ *ibid* s 7(3)(b). Also see s 1(1A).

¹⁸² *ibid* s 8A(3)(b).

¹⁸³ As Lord Neuberger remarked in *Rhodes*, that ‘Parliament has not legislated so as to cover, or to suggest disapproval of, claims in tort based on “one-off” distressing statements as in *Wilkinson and Janvier*’. See *Rhodes v OPO* (n 1) at para 109 per Lord Neuberger.

¹⁸⁴ *Majrowski v Guy’s and St Thomas’s NHS Trust* (n 165) at para 66 per Baroness Hale of Richmond.

Majrowski, that '[a]ll sorts of conduct may amount to harassment'.¹⁸⁵ This *inclusiveness* means that, in theory, the tort of harassment can extend to various kinds of wrongdoing as long as it is repeated. For example, if the impugned conduct occasioned 'an apprehension of immediate and unlawful violence',¹⁸⁶ it should be taken as constituting an assault. On the other hand threats of unlawful and immediate force are likely to be *offensive* and *unacceptable*, and even *oppressive*, and therefore a campaign of such assaults could turn into harassment.¹⁸⁷ Likewise, recurrent conduct of this pattern in the tort under discussion, which satisfies the standard of 'oppressive', 'offensive', and 'unacceptable' behaviour, is also likely to come within the statutory concept of harassment.

Moreover, the potential ambit of harassment is much wider than that of this tort also because intention is not a necessary requirement in the 1997 Act,¹⁸⁸ nor is recognised psychiatric illness or physical harm (as a consequence developing from the inflicted anxiety or distress).¹⁸⁹ Where such wrongdoing is recurrent, it is much easier to meet the requirements of the 1997 Act than those of this tort.

In sum, in relation to recurrent wrongdoing, this tort is overshadowed by the Protection from Harassment Act 1997, retaining a significant role in cases where the alleged wrongdoing happens merely once.

¹⁸⁵ See *ibid*.

¹⁸⁶ *R v Ireland* (n 131) at 166 per Lord Hope of Craighead.

¹⁸⁷ This possibility is also reflected in Protection from Harassment Act 1997 s 4(1): 'A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.'

¹⁸⁸ See *ibid* ss 1(1) and 8(1). Also see Reid (n 132) para 4.03.

¹⁸⁹ Protection from Harassment Act 1997 ss 3(2) and 8(6).

2.23 Insults or other abusive conduct

2.231 In general

A further pattern of conduct can be discerned from the case law – insults or other abusive conduct, which can significantly impugn the victim’s fundamental dignity.¹⁹⁰ In *Wainwright v Home Office*, Lord Scott raised a question as to ‘whether the infliction of humiliation and distress by conduct calculated to humiliate and cause distress, is without more, tortious at common law’?¹⁹¹ His answer was straightforward – it is not, nor should it be.¹⁹² More than ten years later, in *Rhodes v OPO*, Lady Hale and Lord Toulson did not deny the possibility of insults or abusive words being actionable or recoverable under the head of *Wilkinson v Downton*, but left the question open as ‘it has not so far arisen and does not arise for consideration in this case’.¹⁹³ However, in accordance with the requirements of the *Wilkinson* tort reformulated by them, there appears to be *no* sensible reason why insulting and abusive conduct should not be actionable, provided that it is unjustifiable, intended to cause severe emotional distress, and brings about recognised psychiatric illness (or physical harm) in consequence.¹⁹⁴ On the other hand, in acknowledging that insulting or offensive words could be actionable,¹⁹⁵ Lord Neuberger thought that this would probably occur under ‘relatively limited and extreme’ circumstances.¹⁹⁶ What constitutes an ‘unjustified’ or ‘gratuitous’ insult requires to be examined.¹⁹⁷

In a sense Lord Neuberger’s thinking on this matter is compatible with the decisions in *Austen v University of Wolverhampton*¹⁹⁸ and *Giller v Procopets*.¹⁹⁹ In *Austen v*

¹⁹⁰ As the infringed interest is one’s dignity, self-esteem, or mental integrity rather than reputation or other kinds of recognised rights, the inflicted mental harm should still be perceived as stand-alone.

¹⁹¹ *Wainwright v Home Office* (n 42) at para 62 per Lord Scott of Foscote.

¹⁹² *ibid*.

¹⁹³ *Rhodes v OPO* (n 1) at para 77 per Lady Hale and Lord Toulson.

¹⁹⁴ *ibid* at para 88 per Lady Hale and Lord Toulson.

¹⁹⁵ *ibid* at para 107 per Lord Neuberger.

¹⁹⁶ *ibid* at para 109 per Lord Neuberger.

¹⁹⁷ *ibid* at para 110 per Lord Neuberger.

¹⁹⁸ *Austen v University of Wolverhampton* [2005] EWHC 1635 (QB).

¹⁹⁹ *Giller v Procopets* [2008] VSCA 236.

University of Wolverhampton,²⁰⁰ the claimant was described, in a confidential meeting between others at which he was not present, as a ‘sociopath’ and ‘A bull in a China shop type of person’,²⁰¹ which was arguably insulting rather than defamatory. His initial claim for damages on the basis of defamation was accordingly struck out.²⁰² Over and above defamation, the claimant also claimed under the head of ‘intentional infliction of physical or emotional harm’.²⁰³ Mr. Justice Gray recognised the decision in *Wilkinson v Downton* as still binding upon him,²⁰⁴ and that ‘it is no bar to recovery that the statement was not made by the defendant directly to the claimant’.²⁰⁵ In his reasoning Mr. Justice Gray did not deny the likelihood that the alleged insults could be taken as a conduct pattern of this tort. However, the claim based upon the *Wilkinson* tort failed due to the claimant’s failure to prove the requisite aspects of intention and the exacerbation of existent psychiatric injury.²⁰⁶ Also, whether or not the insulting words at issue can be taken as *grave* enough is doubtful.

Giller v Procopets, an Australian case, indicates that insulting and humiliating conduct, damaging to the victim’s dignity, can be regarded as potentially actionable. In this case, the parties used to be a couple.²⁰⁷ After an acrimonious separation, the defendant distributed several videotapes, in which previous sexual activities between them were recorded, to the plaintiff’s family as well as to others.²⁰⁸ The Victoria Court of Appeal held that recovery could be granted on the basis of breach of confidence, whilst striking out the claims of intentional infliction of emotional distress and invasion of privacy.²⁰⁹ The claim based on intentional infliction of emotional distress failed primarily because three judges could not agree over the requisite harm element

²⁰⁰ *Austen v University of Wolverhampton* (n 198).

²⁰¹ *ibid* at para 9 per Mr Justice Gray.

²⁰² *ibid* at para 2 per Mr Justice Gray.

²⁰³ *ibid*.

²⁰⁴ *ibid* at para 7 per Mr Justice Gray.

²⁰⁵ *ibid* at para 10 per Mr Justice Gray. It should be noticed that, after the ruling of *Rhodes*, the disputed wrongdoing must be ‘directed at’ the claimant. See *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson. However, this new requirement should not be seen as an attempt to exclude recovery for secondary victims. Relevant analyses see Chapter 5, section 5.2.

²⁰⁶ *Austen v University of Wolverhampton* (n 198) at paras 11-16 per Mr Justice Gray.

²⁰⁷ *Giller v Procopets* (n 199) at para 224 per Neave JA.

²⁰⁸ *ibid* at paras 124-125 per Ashley JA.

²⁰⁹ *ibid* at para 129 per Ashley JA.

in respect of the *Wilkinson* tort.²¹⁰ However, none of them disagreed with the idea that the wrongdoing at issue was deliberate and insulting, and in principle capable of meeting the required conduct element of the *Wilkinson* tort. In particular, Maxwell P, dissenting, found that the insulting conduct not only had the potential to inflict serious emotional distress,²¹¹ but also was ‘extreme and outrageous’.²¹² In his opinion, the conduct should have been actionable, and the severe emotional distress suffered by Ms. Giller compensated on the basis of the *Wilkinson* tort.

Following from these two decisions, it appears that insulting or abusive wrongdoing, standing on its own in the absence of other aggravating factors, has not been explicitly admitted as actionable. Although in principle it appears to have been accepted that conduct of this type might *potentially* be actionable, in neither case did the court allow the claim to proceed on the basis of the evidence before it.

In the following subsections, the wrongdoing considered is of an insulting or abusive nature, yet it is closely associated with other aggravating factors or other types of conduct pattern. It is held to be actionable most likely because other considerations are also brought into the balance.

2.232 Exploiting the victims’ vulnerability in conjunction with insults or other abusive conduct

The wrongdoing of an insulting or abusive nature considered in this part is intermingled with *the exploitation of the victims’ vulnerability*. This either aggravates the seriousness of the conduct, or even forms an essential and inseparable aspect of its insulting or abusive character. In *C v D, SBA* and in *ABC v WH 2000 Ltd v William Whillock*, the exploitation of the victims’ vulnerability – their minority or fragile physical and mental state – exemplifies the latter. In other words, the exploitation of

²¹⁰ *ibid* at para 31 per Maxwell P; at paras 164-165 per Ashley JA; at paras 471-478 per Neave JA.

²¹¹ *ibid* at para 36 per Maxwell P.

²¹² *ibid* at paras 37-38 per Maxwell P.

fragility/minority was an essential and inseparable part of the gravity and actionability of the wrongdoing in question. Both cases also involved abuse of power or unequal status.

In *C v D, SBA*, a case predating the Protection from Harassment Act 1997, various forms of wrongdoing had been inflicted upon the claimant – at that time a pupil at a junior day school.²¹³ Apart from battery,²¹⁴ two incidents were dealt with on the basis of *Wilkinson v Downton*. Firstly, the defendant, the headmaster of that school,²¹⁵ videoed the claimant when he was ‘taking a shower’ together with his classmates.²¹⁶ On the second occasion, when the claimant fainted, the defendant took the claimant to the infirmary, undressed him and stared at his genitals for several minutes.²¹⁷ The judge emphasised that the second wrongdoing was committed ‘when C was especially vulnerable’, and constituted ‘a gross invasion of his personal integrity’,²¹⁸ which should be recoverable on the footing of *Wilkinson v Downton*.²¹⁹

ABC v WH 2000 Ltd v William Whillock is another case where the exploitation of the victim’s vulnerability formed an essential part of the abusive conduct. In this case, the claimant alleged that whilst she was 16 years old, the defendant who was Vice Principal and Head of Boarding at her school²²⁰ attempted to develop a relationship with her, ‘encouraging her to send indecent images of herself to him’, and ultimately ‘sexually assaulting her’.²²¹ Quite apart from the alleged sexual assaults,²²² Sir Robert Nelson pointed out that, in respect of the *Wilkinson* or the *Rhodes* claim, having been aware of the emotional vulnerability of the claimant,²²³ the defendant’s actions were capable of bringing about (mental) harm,²²⁴ as they placed the claimant in an

²¹³ *C v D, SBA* [2006] EWHC 166 (QB) at para 2 per Mr Justice Field.

²¹⁴ *ibid* at paras 84 and 87 per Mr Justice Field.

²¹⁵ *ibid* at para 2 per Mr Justice Field.

²¹⁶ *ibid* at paras 4, 10, and 97 per Mr Justice Field.

²¹⁷ *ibid* at paras 4, 12, and 98 per Mr Justice Field.

²¹⁸ *ibid* at para 98 per Mr Justice Field.

²¹⁹ *ibid* at para 100 per Mr Justice Field.

²²⁰ *ABC v WH 2000 Ltd v William Whillock* (n 6) at para 3 per Sir Robert Nelson.

²²¹ *ibid* at para 2 per Sir Robert Nelson.

²²² *ibid* at para 76 per Sir Robert Nelson.

²²³ *ibid* at para 83 per Sir Robert Nelson.

²²⁴ *ibid* at para 89 per Sir Robert Nelson.

even more vulnerable position, and rendered the preventable harm inescapable.²²⁵ In other words, this wrongdoing was found to be abusive, seriously damaging, and potentially actionable because the defendant's knowledge (and exploitation) of the claimant's emotional fragility and her minority were taken into consideration.²²⁶

In two further cases, where the victims were not minors when they were wronged, the exploitation of their vulnerability can still be seen as aggravating the seriousness of the wrongdoing. In *Boothman v R*, as discussed in 2.222, in addition to threatening behaviour the supervisor exploited the plaintiff's mental fragility by making 'derogatory comments about her abilities and her emotional and psychological health'.²²⁷ This wrongdoing was held to have generated 'extreme emotional reactions'²²⁸ and occasioned harm.²²⁹ Likewise, in another Canadian case, *Bogden v Purolator Courier Ltd*, apart from threatening the plaintiff with a disciplinary process or even with dismissal,²³⁰ the defendant frequently uttered derogatory and sarcastic remarks to the plaintiff.²³¹ Taking into account the employer's awareness of the plaintiff's mental fragility,²³² these insults, in conjunction with other threatening acts, were found to have had a cumulative effect and to have been extreme and outrageous.²³³ In both cases, the exploitation of the victims' vulnerability was plainly an aggravating factor of the alleged wrongdoing.

2.233 Abusing power or unequal status in conjunction with insults or other abusive conduct:

The insults or abusive conduct analysed under this section are those perpetrated in concomitance with abuse of power or unequal status. The shared feature of all cases is

²²⁵ *ibid* at para 83 per Sir Robert Nelson.

²²⁶ *ibid* at paras 83 and 89 per Sir Robert Nelson.

²²⁷ *Boothman v R* (n 75) at para 76 per Noël J.

²²⁸ *ibid*.

²²⁹ *ibid* at para 99 per Noël J.

²³⁰ *Bogden v Purolator Courier Ltd* (n 9) at para 20 per Ritter J.

²³¹ *ibid* at paras 17-18 per Ritter J.

²³² *ibid* at paras 81 and 84 per Ritter J.

²³³ *ibid* at para 79 per Ritter J.

that the wrongdoer can insult or otherwise abuse the victims because the former enjoys a superior power, authority, or status. The other side of the coin is that the possession of superior power or status may also render the insulting or abusive conduct of the wrongdoer much more damaging. Although conduct of this type is more typically to be found in the employment context, unequal status and abuse of power can also be observed in other contexts, such as in schools, prisons, or comparable institutions.

2.2331 In the context of employment:

In cases arising in the context of employment, it is possible to discern not only the characteristics of *abuse of power/status* and *insults*, but also the pattern of *threats with work-related negative consequences*. As a result, the relative importance of the insulting conduct to the overall gravity of the wrongdoing is not easy to specify. However, the following case is exceptional as threatening words or conduct were not involved, but simply insulting conduct and the abuse of power.

2.23311 Wrongdoing involving abuse of power and insulting/abusive conduct only

In *CVC Services v IWA-Canada, Local 1-71*, a Canadian arbitration case, the grievor was dismissed by CVC Services, due to various complaints made against her, among which the pivotal one was directed at her promiscuity.²³⁴ This allegation was held to be unfounded and untrue,²³⁵ and the employer's conduct was found to be 'flagrant and extreme'.²³⁶ In this case, the loss of the grievor's job was predicated on an allegation of such an insulting nature, capable of seriously damaging the grievor's dignity and mental integrity. Depriving the grievor of her employment without a corroborated and legitimate basis can be taken as a form of abuse of power by the employer, which arguably constituted or heightened the gravity of the employer's conduct.

²³⁴ *CVC Services v IWA-Canada, Local 1-71* (n 9) at paras 69 and 71 per Lanyon (Member).

²³⁵ *ibid* at paras 72 and 78 per Lanyon.

²³⁶ *ibid* at para 79 per Lanyon.

2.23312 Wrongdoing involving abuse of power, insulting, and also threatening conduct

As previously discussed, in the context of employment, most of the cases manifest three characteristics – abuse of power, insulting/abusive conduct, as well as threatening with work-related negative consequences. These characteristics overlap in the cases following the second conduct pattern which have already been explored, such as *Prinzo v Baycrest Centre for Geriatric Care*, *Boothman v R*, *Nationwide News Pty Ltd v Naidu*, *Rahemtulla v Vanfed Credit Union* and so on, and they will not be reiterated here. However, two further Canadian cases should also be considered. In these cases, the patterns of insulting/abusive conduct and abuse of power seem to be relatively more important, despite the presence of the feature of threatening conduct in addition.

In these two cases, the wrongdoers abused their power and seriously insulted the victims, in order to force them to resign. In the first case, *Boucher v Wal-Mart Canada Corp*, the wrongdoer, Pinnock, was the respondent's supervisor. Due to conflict between them, Pinnock commenced an 'unrelenting and increasing torrent of abuse' against the respondent,²³⁷ demeaning and humiliating her in private as well as in front of other employees for nearly six months, even stating that 'her career was blowing away'.²³⁸ These multiple and continuous wrongdoings by Pinnock – mainly abusing power and insulting her – were held to be 'flagrant and outrageous',²³⁹ as well as serving the unlawful goal of forcing the respondent to leave her workplace.²⁴⁰ Likewise, in *Smith v Alwarid*, following some conflicts the defendant, who was the Deputy Minister of Education,²⁴¹ removed authority from the plaintiff, uttering verbal attacks and demeaning him as a 'fucking idiot and a typical bureaucrat', treating him

²³⁷ *Boucher v Wal-Mart Canada Corp* (n 9) at para 24 per Laskin JA.

²³⁸ *ibid* at paras 25, 26 and 50 per Laskin JA.

²³⁹ *ibid* at para 50 per Laskin JA.

²⁴⁰ *ibid* at para 51 per Laskin JA.

²⁴¹ *Smith v Alwarid* [1996] YJ No 139 at paras 3-4 per Hudson J.

in a very rude and unfair way.²⁴² Eventually, the defendant stripped the plaintiff of his position, in contravention of the government policy.²⁴³ Such conduct was without doubt seriously insulting and capable of constituting abuse of power. As demonstrated here, the abuse of power or the presence of unlawful motive/purpose²⁴⁴ almost certainly heightens the gravity of the insults at issue.

2.2332 In other contexts:

The characteristics of abuse of power/unequal status in conjunction with insulting/abusive conduct can also be discerned in other contexts. For instance, the contexts of the above-analysed cases *C v D*, *SBA* and *ABC v WH 2000 Ltd v William Whillock* are related to schools. In addition to exploiting the vulnerability and minority of the victims, the wrongdoers in both cases could be considered as having abused their superior positions – as headmaster²⁴⁵ or vice principal and head of boarding at the school in question.²⁴⁶ In both cases the wrongdoers would not have had the opportunity to exploit the vulnerability of children without being in a position of power, which they then proceeded to abuse.

2.234 Analysis

It can be seen from the above review that insulting or abusive conduct, standing on its own without aggravating factors or other types of conduct pattern, has not been explicitly admitted as actionable. In contrast, where the insulting or abusive conduct was committed in conjunction with aggravating factors – in particular the exploitation of the victims' vulnerability, or the abuse of power or unequal status –, the wrongdoing at issue seemed to be evaluated by the courts in a different way. Where the victim's

²⁴² *ibid* at paras 26-27, 52-56 per Hudson J.

²⁴³ *ibid* at para 59 per Hudson J.

²⁴⁴ See Chapter 3, section 3.323.

²⁴⁵ *C v D*, *SBA* (n 213) at para 2 per Mr Justice Field.

²⁴⁶ *ABC v WH 2000 Ltd v William Whillock* (n 6) at para 3 per Sir Robert Nelson.

vulnerability has been exploited and the perpetrator has conducted himself or herself in an insulting/abusive manner, English and Canadian authorities find such conduct to be actionable or extreme, flagrant or outrageous.²⁴⁷ Likewise, the patterns of insulting behaviour in combination with abuse of power or unequal status have also been held by courts as actionable or extreme, flagrant and outrageous.²⁴⁸

Other categories of conduct pattern are also seen combined with insulting or abusive behaviour. For instance, in the employment context, it is frequently seen that insults and threats are both involved, interwoven with each other as well as with other aggravating factors. In regard to lack of justification, it appears that the more aggravating factors and conduct patterns are involved in a case, the more likely it is that the wrongdoing in question would be found to be unjustifiable.

In addition, the insulting or abusive conduct in some of the above cases is reminiscent of other torts. For instance, in *Austen v University of Wolverhampton* a claim for damages for defamation was struck out at an earlier stage,²⁴⁹ and in *CVC Services v IWA-Canada, Local 1-71*, a claim for damages for libel was the subject of separate proceedings.²⁵⁰ Moreover, the wrongdoing found in *Giller v Procopets*²⁵¹ and *C v D, SBA*²⁵² may have a bearing on invasion of privacy. As a result, the boundary between defamation and this tort (in particular this conduct pattern), as well as the boundary between invasion of privacy and this tort, require to be explored.

2.235 The demarcation between this conduct pattern and defamation

This section will attempt to draw the boundary between the conduct pattern of the tort

²⁴⁷ See *C v D, SBA, ABC v WH 2000 Ltd v William Whillock, Boothman v R*, and *Bogden v Purolator Courier Ltd* in the above case review.

²⁴⁸ See *CVC Services v IWA-Canada, Local 1-71, Boucher v Wal-Mart Canada Corp, Smith v Alwarid*, as well as *C v D, SBA* and *ABC v WH 2000 Ltd v William Whillock* in the above case review.

²⁴⁹ *Austen v University of Wolverhampton* (n 198) at para 2 per Mr Justice Gray.

²⁵⁰ *CVC Services v IWA-Canada, Local 1-71* (n 9) at para 46 per Lanyon.

²⁵¹ *Giller v Procopets* (n 199) at paras 124-125 per Ashley JA.

²⁵² *C v D, SBA* (n 213) at paras 4, 12, and 98 per Mr Justice Field.

under discussion here and that of defamation. The delict of ‘verbal injury’²⁵³ will not be investigated in this section. This is because the main drift of the law of verbal injury in the modern law has been towards providing protection to business interests and patrimonial loss; the ambit of verbal injury concerning personality interests has been considerably marginalised. Following the analysis in *Steele v Scottish Daily Record and Sunday Mail Limited*,²⁵⁴ the scope of verbal injury in regard to injured feelings seems to be substantially limited and even to ‘have no future role’.²⁵⁵ In its Report on *Defamation*, the Scottish Law Commission considered the ‘verbal injuries relating to individuals and feelings’ as ‘shrouded in obscurity’ and ‘no longer of practical utility’, suggesting their abolition.²⁵⁶ Accordingly, this section will focus solely upon defamation.

2.2351 The boundary of defamation

In England and Wales, much of the law of defamation has now been put on to a statutory footing by the Defamation Act 2013.²⁵⁷ Very little of the 2013 Act applies to Scotland,²⁵⁸ where the law of defamation remains mainly based on the common law.²⁵⁹ An examination of the elements of defamation law in each jurisdiction sheds

²⁵³ Analyses of verbal injury see K Mck Norrie, ‘Actions for Verbal Injury’ (2003) 7(3) EdinLR 390; Reid (n 132) chs 6-9; Walker (n 140) ch 23.

²⁵⁴ In this crucial verbal injury case, Lord Wheatley required the following elements to be proved before ‘solatium for injury to feeling’ could be granted: ‘that the article, though not slanderous, was false at least in some material respect’; ‘that the falsity was intended to bring him into public hatred and contempt’; and ‘that it did so’. Moreover, the disputed words must generate some effects ‘more than public disapproval, adverse comment or criticism’, being something ‘of the order of condemn or despise’. These requirements were considered by Lord Wheatley as ‘something stronger than the test laid down in England by Lord Atkin in *Sim v Stretch* (1936) 52 TLR 669, namely “tending to lower the plaintiff in the estimation of right thinking members of society”’. See *Steele v Scottish Daily Record and Sunday Mail Ltd* 1970 SLT 53 at 61-62 per Lord Wheatley. In consequence the pursuer failed to overcome the barriers of proof.

²⁵⁵ Reid convincingly argued that ‘[o]nce that line [of defamatory] is crossed there seems little to be gained in bringing an action for verbal injury, rather than for defamation, given that the latter in most cases carries the advantages of the presumptions of malice and of falsity’. See Reid (n 132) para 8.26.

²⁵⁶ Scottish Law Commission, *Defamation* (Scot Law Com No 248, 2017) paras 9.29 and 9.32. In contrast, the ‘verbal injuries relating to economic interests’ should be retained and reformulated in statutory form, see paras 9.19-9.23.

²⁵⁷ Defamation Act 2013.

²⁵⁸ For provisions that extend to Scotland, see Explanatory Notes to the Defamation Act 2013 para 7.

²⁵⁹ Scottish Law Commission, *Defamation* (Scot Law Com DP No 161, 2016) para 1.11 and footnote 14.

light on the demarcation between defamation and insult (under the head of the *Wilkinson* tort).

In English law, the foremost requirement of defamation is that a ‘defamatory’ statement or imputation must be made.²⁶⁰ The concept of ‘defamatory’ might encompass injury to ‘the reputation of another, by exposing him to hatred, contempt and ridicule’,²⁶¹ ‘words which make a person be shunned or avoided’,²⁶² conduct that is likely ‘to lower the plaintiff in the estimation of right-thinking members of society generally’,²⁶³ or ‘likely to affect a person adversely in the estimation of reasonable people generally’.²⁶⁴ After the decision in *Thornton v Telegraph Media Group Ltd*²⁶⁵ and the passage of Defamation Act 2013,²⁶⁶ the qualification of *seriousness* has been attached to these dicta as regards (the consequences of) defamatory statements.²⁶⁷ According to the Defamation Act 2013 s 1(1), ‘A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.’²⁶⁸ As this requirement is a bar rather than a definition,²⁶⁹ and the Explanatory Notes to the Act do not state that previous dicta as regards ‘defamatory’ would be abandoned,²⁷⁰ the traditional tests provided in previous case law should remain applicable, but the defamatory imputation certainly has to meet the requirement of seriousness.²⁷¹

In Scots law, the reading of the term *defamatory* has been informed to a significant extent by English case law. Lord Atkin’s dictum regarding ‘to lower the plaintiff in

²⁶⁰ A Mullis, R Parkes and C Gatley, *Gatley on Libel and Slander* (12th edn, 2013) 31 (or para 2.1); R Mulheron, *Principles of Tort Law* (2016) 769.

²⁶¹ *Parmiter v Coupland* 151 ER 340 at 342.

²⁶² *Youssouf v MGM Pictures Ltd* (1934) 50 TLR 581 at 587 per Slessor LJ.

²⁶³ *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin.

²⁶⁴ *Skuse v Granada Television Ltd* [1996] EMLR 278 at 286 per the Master of the Rolls. Also see *Gillick v BBC* [1996] EMLR 267 at 273-274 per Neill LJ.

²⁶⁵ *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

²⁶⁶ Defamation Act 2013.

²⁶⁷ Mullis, Parkes and Gatley (n 260) 32-33; Clerk and Dugdale (n 41) paras 22-17 and 22-18.

²⁶⁸ Defamation Act 2013 s 1(1).

²⁶⁹ J Price and F McMahon (eds), *Blackstone’s Guide to the Defamation Act 2013* (2013) para 2.42.

²⁷⁰ Clerk and Dugdale (n 41) para 22-18.

²⁷¹ Price and McMahon (n 269) para 2.42.

the estimation of right-thinking members of society generally’²⁷² continues to be adopted in modern practice in the same or parallel terms.²⁷³ On the basis of this dictum, the Scottish Law Commission observed in its Report as well as Discussion Paper on *Defamation*, that ‘defamatory’ may be defined as ‘damag[ing] the reputation of the pursuer in the eyes of the ordinary reader, viewer, or listener’,²⁷⁴ or ‘tend[ing] to make ordinary readers think the worse of the pursuer’.²⁷⁵ As to whether the threshold of seriousness should be adopted in Scotland, after reviewing a line of English authorities including *Jameel (Yousef) v Dow Jones & Co Inc*,²⁷⁶ *Thornton v Telegraph Media Group Ltd*,²⁷⁷ and in particular *Lachaux v Independent Print Ltd*,²⁷⁸ the Scottish Law Commission observed that ‘the issues of costs and complexity... associated with the section 1(1) test are not as significant as was initially feared’.²⁷⁹ Putting different arguments into balance, the Scottish Law Commission recommended that a statutory threshold of ‘serious harm to the reputation’ should be introduced into the Scots law of defamation,²⁸⁰ which would not alter the definition of defamation in the common law sense.²⁸¹ It seems probable that, in the future, the threshold of ‘serious harm to the reputation’ can be adopted in the Scots law of defamation, as it is in the English counterpart.

A crucial element of defamation is *publication*. In English law, for a claim predicated upon defamation to survive, the defamatory remarks must be published to a third party,²⁸² namely ‘making known the defamatory matter after it has been written to some person other than the person of whom it is written’.²⁸³ After the decision in

²⁷² *Sim v Stretch* (n 263) at 1240 per Lord Atkin.

²⁷³ Scottish Law Commission (n 259) paras 2.7 and 2.8.

²⁷⁴ Scottish Law Commission (n 256) para 1.2.

²⁷⁵ Scottish Law Commission (n 259) para 2.8.

²⁷⁶ *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75.

²⁷⁷ *Thornton v Telegraph Media Group Ltd* (n 265).

²⁷⁸ *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334. Also see *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB). In the former decision, the Court of Appeal (Lord Justice Davis, agreed by other members) unanimously upheld the decision of the trial court. As to the approaches regarding Defamation Act 2013 s 1(1) outlined by Lord Justice Davis, see para 82.

²⁷⁹ Scottish Law Commission (n 256) para 2.10.

²⁸⁰ *ibid* paras 2.12 and 2.14.

²⁸¹ *ibid* para 2.12.

²⁸² Mullis, Parkes and Gatley (n 260) para 6.1; Clerk and Dugdale (n 41) para 22-51.

²⁸³ *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 527 per Lord Esher. Also see *Ibrahim v Swansea University* [2012] EWHC 290 (QB) at paras 12 and 14 per Mr Justice Eady.

Jameel (Yousef) v Dow Jones & Co Inc and the coming into force of the Defamation Act 2013, the extent of publication becomes an important factor to be considered in determining whether the requirement of serious harm to reputation has been met. Circulation to limited numbers of people may no longer be recognised as sufficiently harmful.²⁸⁴

In Scots law the position is slightly different. Publication, communication or circulation to a third party *is not strictly required* in Scots law.²⁸⁵ According to older authorities, it is possible to bring an action for defamation communicated to the pursuer alone.²⁸⁶ However, whether this position is sustainable today is open to question. In its Report on *Defamation*, the Scottish Law Commission observed this traditional rule as ‘antiquated’ and ‘being out of step with...other parts of the world’.²⁸⁷ It is recommended that communication to ‘someone other than the person who is the subject of it’ should be a requisite of actionable defamation.²⁸⁸ This approach would be more compatible with the proposed introduction of ‘threshold of serious harm to reputation’.²⁸⁹ Accordingly, publication or communication to a third party may become a requirement of the Scots law of defamation in the coming future.

2.2352 Beyond defamation: the applicability of this tort (this conduct pattern)

The prerequisites of defamation have been briefly introduced above. Thus the law of defamation does not provide a remedy where: 1) the imputation has not surmounted the threshold of ‘serious harm to the reputation’; or 2) the extent of publication is regarded as limited; or 3) the imputation is true. Where these requirements are not met, it may nevertheless be possible for the disputed statements to be treated as an insult,

²⁸⁴ Mullis, Parkes and Gatley (n 260) para 6.1; Clerk and Dugdale (n 41) para 22-51.

²⁸⁵ Cameron (n 140) para 4-01; Reid (n 132) para 10.35; K Mck Norrie, ‘The Scots Law of Defamation: Is There A Need for Reform?’ in NR Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 433 at 438.

²⁸⁶ *Mackay v M’Cankie* (1883) 10 R 537 at 539 per Lord President; *Ramsay v MacLay & Co* (1890) 18 R 130 at 133 per Lord Justice-Clerk; *Thomson v Kindell* 1910 2 SLT 442 at 444 per Lord Dewar.

²⁸⁷ Scottish Law Commission (n 256) para 2.4.

²⁸⁸ *ibid* paras 2.4 and 2.8.

²⁸⁹ *ibid* para 2.4.

since this conduct pattern has a different focus and characteristics. An insult is an attack upon one's dignity, honour, or self-esteem which generates emotional distress and even mental harm,²⁹⁰ without necessarily having an impact on reputation or social standing. As explored in sections 2.231 and 2.234, the conduct pattern of insult may be actionable under the head of the *Wilkinson* tort, albeit in 'relatively limited and extreme' circumstances,²⁹¹ such as being associated with aggravating factors or other types of conduct pattern. The potential applicability of insult (or the *Wilkinson* tort) in the above-listed three circumstances will be investigated as follows.

2.23521 The imputation having not surmounted the threshold of seriousness required by the law of defamation:

As analysed in 2.2351, serious harm to the reputation of the claimant is a requirement for any action of defamation to succeed.²⁹² In respect of Scots law, though it is unclear at the present stage whether a parallel requirement will be implemented, the Scottish Law Commission has recommended that a statutory threshold of 'serious harm to the reputation' should be introduced into the Scots law of defamation.²⁹³ Pursuant to the Defamation Act 2013 s 1(1) in England, where this threshold of seriousness cannot be satisfied, the disputed imputation would not be actionable. Nevertheless, this tort may be relevant, specifically where the defendant's conduct may be categorised as insulting. Of course this tort should not be used as a means to circumvent the raised threshold of defamation. However, defamation and insult are significantly different, so that the latter can be employed to protect against serious harm to dignity or mental integrity even when it does *not* also entail serious harm to reputation. For example, referring to a person as a rape victim or ridiculing him/her for his/her being raped may not inflict

²⁹⁰ K Mck Norrie, 'The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today?' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (2013) 49 at 50-52. Also see E Descheemaeker and H Scott, 'Iniuria and the Common Law' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (2013) 1 at 1.

²⁹¹ *Rhodes v OPO* (n 1) at paras 107-109 per Lord Neuberger.

²⁹² Defamation Act 2013 s 1(1).

²⁹³ Scottish Law Commission (n 256) paras 2.12 and 2.14.

serious harm to the victim's reputation from the modern perspective,²⁹⁴ yet it may seriously damage his or her dignity or mental integrity, where the rape has occurred²⁹⁵ or where the victim has some sort of emotional fragility.²⁹⁶ Likewise, insulting someone as 'no longer being a virgin' can *hardly* in a serious manner affect other right-thinking people's attitudes towards him or her. Yet it is imaginable that this imputation might harm his or her dignity and mental integrity, especially when the person has a sensitive predisposition, or when the person is from a certain religious or ethnic background, where virginity is highly treasured.²⁹⁷ Under these circumstances, this tort can arguably provide some protection, particularly where the statement is *not* uttered in public (or to a third party).²⁹⁸

Furthermore, as some commentators have pointed out, the serious harm threshold may mean that certain defamatory imputations previously regarded as actionable as 'exposing a person to ridicule' and 'causing others to shun and avoid one' may no longer find a remedy.²⁹⁹ Again, the conduct pattern of *insult* or the *Wilkinson* tort may provide legal protection in these situations. What occurred in *Uppal v Endemol UK Ltd*³⁰⁰ may serve to illustrate this kind of possibility. In a competition TV programme, the claimant was insulted and ridiculed by other housemates. On the first occasion, one of the housemate referred to her as 'a piece of shit' and 'stupid bastard', insulting and ridiculing her through a vulgar rap.³⁰¹ On the second broadcast episode, two

²⁹⁴ See R Parkes, 'Privacy, Defamation, and False Facts' in NA Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, 2016) 349 at para 8.04. Compare the ruling of *Youssouf v MGM Pictures Ltd* (n 262). In this case, a false suggestion of Princess Youssouf's being raped in a film was held as constituting defamatory.

²⁹⁵ This point will be further discussed in section 2.23523.

²⁹⁶ Where the imputation of someone's being raped is *false*, it is difficult to imagine that someone's dignity or mental integrity would be seriously harmed by it, unless he or she has some kind of emotional fragility or sensitivity.

²⁹⁷ Certainly, the wrongdoer must have knowledge of these circumstances and exploit them.

²⁹⁸ Admittedly, if these words (regarding rape or loss of virginity) are said in public or to a third party, they could also constitute disclosure/misuse of private information.

²⁹⁹ Mullis, Parkes and Gatley (n 260) paras 2.10 and 2.15. Also see Price and McMahon (n 269) paras 2.43 and 2.44.

³⁰⁰ *Uppal v Endemol UK Ltd* 2014 EWHC 1063 (QB).

³⁰¹ '[Rapping] It's your epilator, stick it up your arse, we don't give a fuck because I'm going to fucking smash your face you little piece of shit'; 'With who? I'll give her a fun game, I'll stick this [showing the hair brush] up her fucking minge, the stupid bastard, I'll give her a fucking epilator [thrusting the hair brush towards his groin]. I'm gonna play loads of pranks on her because she's a fucking piece of shit...'. See *ibid* at para 6 per Justice Dingemans.

housemates ridiculed the claimant's eating manner as a form of Indian culture.³⁰² Accepting that the disputed statements must surmount the threshold of seriousness to be actionable as defamatory,³⁰³ Justice Dingemans found the description of 'piece of shit' as merely 'vile abuse',³⁰⁴ the rap as ridiculing,³⁰⁵ and the racial statements as 'offensive racial stereotyping'.³⁰⁶ Nonetheless, none of the words complained of could be counted as defamatory,³⁰⁷ and the defamation claim was struck out accordingly.³⁰⁸ However, varying the above scenario slightly, let us assume that an insult is substantially *directed at* the victim, containing the words like 'a piece of shit', 'stupid bastard', or something as vulgar as depicted in the complained rap, it seems arguable that such insulting invective might seriously harm the victim's dignity and mental integrity. Provided that the mental and consequence elements have also been met, such behaviour may be sufficient to constitute the conduct element and the claimant would accordingly have a case on the basis of the *Wilkinson* or the *Rhodes* tort,³⁰⁹ in particular if any aggravating factor is involved.³¹⁰

2.23522 The extent of publication being limited:

The second circumstance under which the conduct pattern of insult can provide legal protection beyond the reach of defamation is where the requirement of publication cannot be met. Essentially concerned with injury to dignity and mental well-being, insult (under the head of the *Wilkinson* tort) does not necessarily require publication. In *Janvier v Sweeney*, Bankes LJ explicitly pointed out that '[t]he distinction between actions of slander and actions of this kind is very clear. In slander it is necessary to prove publication, and so the words must have been uttered to some person other than

³⁰² *ibid* at para 9 per Justice Dingemans.

³⁰³ *ibid* at para 21 per Justice Dingemans.

³⁰⁴ *ibid* at para 24 per Justice Dingemans.

³⁰⁵ *ibid* at para 26 per Justice Dingemans.

³⁰⁶ *ibid* at para 27 per Justice Dingemans.

³⁰⁷ *ibid* at paras 27-28 per Justice Dingemans.

³⁰⁸ *ibid* at paras 29 and 32 per Justice Dingemans.

³⁰⁹ The requisite elements of this tort see *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

³¹⁰ As analysed, such as insulting in company with abusing power or unequal status; or insulting in connection with exploiting others' vulnerabilities.

the person complaining of the physical injury’.³¹¹ This demarcation is relatively clear-cut in respect of English law. The Scots law position is slightly different since, as discussed above, communication to *a third party* is not an essential requirement in Scots law.³¹² In practice, however, it is thought unlikely that a claim for defamation would succeed in the modern law where the defamatory imputation had been seen or heard by the pursuer alone, and in any event, it is likely that any future reform of the law of defamation in Scotland would make publication a prerequisite.³¹³ A similar gap thus arises in Scots law, which this tort might credibly address.

As discussed above, the *scale of publication* now plays a more significant role.³¹⁴ Hence the distinction between defamation and insult in this regard becomes sharper. Where the disputed statements have not been published or only circulated on a limited scale, protection can nevertheless be accorded on the footing of insult (of the *Wilkinson* tort), as long as its prerequisites³¹⁵ – in particular the statements must be factually or substantially *directed at* the victim³¹⁶ – have been satisfied.

Some comparable examples can be seen in the Canadian cases discussed earlier. In Canadian tort Law, *publication to a third party* is also a required element of defamation.³¹⁷ In *Rahemtulla v Vanfed Credit Union*, for instance, the accusation of theft³¹⁸ without investigation and evidence was arguably capable of ‘lower[ing] the plaintiff in the estimation of right-thinking members of society generally’.³¹⁹

³¹¹ *Janvier v Sweeney* (n 62) at 323 per Banks LJ.

³¹² Cameron (n 140) para 4-01; Reid (n 132) para 10.35.

³¹³ Scottish Law Commission (n 256) paras 2.4 and 2.8.

³¹⁴ The extent of publication is an important factor to be considered in determining whether the raised threshold of serious harm to reputation has been met. See Mullis, Parkes and Gately (n 260) paras 6.1-6.2; Clerk and Dugdale (n 41) para 22-51.

³¹⁵ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

³¹⁶ For a claimant to succeed in a defamation case, it is *not* required that the communicated or published statement be *directed at* him or her. However, in respect of this tort, except for secondary victim cases, the wrongdoing (words or conduct) must be *directed at* the victim, factually or substantially.

³¹⁷ ‘There can be no cause of action in libel unless the writing complained of is published’. See *Arnott v College of Physicians & Surgeons (Saskatchewan)* [1954] SCR 538 at para 81 per Locke J; ‘Publication takes place where the defamatory matter is brought by the defendant or his agent to the knowledge and understanding of some person other than the plaintiff’. See *McNichol v Grandy* [1931] SCR 696 at para 23 per Duff J.

³¹⁸ *Rahemtulla v Vanfed Credit Union* (n 8) at para 55 per McLachlin J.

³¹⁹ *Sim v Stretch* (n 263) at 1240 per Lord Atkin. This dictum is also accepted in Canadian law as the

However, the plaintiff originally brought an action for wrongful dismissal and defamation but chose not to pursue the action for defamation.³²⁰ Apart from the wrongful dismissal claim, the case was ultimately decided on the basis of the *Wilkinson* tort. Compensation was awarded in the light of the serious (humiliation and) mental distress.³²¹ The reason may have been that the injurious remarks were mainly uttered to the victim herself rather than communicated to the public. Such instances reinforce the point that insult (under the head of the *Wilkinson* tort) has different characteristics and in the more egregious sorts of cases as depicted above can render protection where the law of defamation has reached its limits.

2.23523 Truthful imputations

a) In general

In the law of defamation, *truth* is a complete defence.³²² Regardless of how damaging or humiliating the impugned imputation might be, the law of defamation offers no recourse where the imputation *is found to be true*. In contrast, the *truth* or *falsity* of the disputed statement is not an absolute concern to *insult* or the *Wilkinson* tort. Admittedly, the gap pertinent to true statements/disclosure of true information has to a large extent been filled by the law of privacy.³²³ However, there is still scope for *insult* under the head of the *Wilkinson* tort to serve a function, since, as compared to the law of privacy (in particular the tort of misuse of private information), it provides

construction of ‘defamatory’.

³²⁰ *Rahemtulla v Vanfed Credit Union* (n 8) at para 8 per McLachlin J.

³²¹ *ibid* at paras 59-60 per McLachlin J.

³²² *Parkes* (n 294) at paras 8.11 and 8.28; *Reid* (n 132) para 11.02; J Gordley, *Foundations of Private Law* (2006) 245. Also see Defamation Act 2013 s 2(1), ‘It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true’.

³²³ *Gordley* (n 322) 233-236. In England, as there is no recognised tort of invasion of privacy, relevant causes of action are breach of confidence and misuse of private information. In Scotland, breach of confidence is also a well-recognised cause of action, yet the status of misuse of private information is not quite clear, as no contemporary case has been decided upon the basis of it. Nonetheless, it is cogently argued that ‘Scots law, like English law, must recognise misuse of private information as a delictual wrong’. See *Reid* (n 132) paras 14.51-14.52. The tort of misuse of private information will be introduced in the following section.

protection against different sorts of wrongdoing. For instance, uttering abusive, injurious, *but true*, statements might not be covered by the law of privacy where the uttered statements are neither confidential nor private. But even when the contents of the abusive statements relate to private information, a *disclosure* or *misuse* of private information would not necessarily occur. It is possible that the wrongdoer did not attempt to obtain or distribute the private information, but happened to witness the victim's private affairs or hear about them from others, then insulted the victim on the basis of that information.

For example, A happens to know that B had been raped or sexually abused in the past. On one occasion A insults or ridicules B (without the presence of other people) for his or her being raped/abused. As analysed above,³²⁴ this statement may not inflict serious harm to B's reputation from the modern perspective.³²⁵ In addition, since there is no disclosure or misuse of this private information, B cannot resort to the tort of misuse of private information. However, it is arguable that this insult could seriously injure B's dignity or mental integrity, and this would be all the more likely if B is in some way emotionally vulnerable.

Notably, if a truth-based insult or attack relates to characteristics such as 'age', 'disability', 'gender reassignment', 'race', 'religion or belief', 'sex', and 'sexual orientation', it may become a prohibited conduct – such as harassment – covered by the Equality Act 2010.³²⁶ Apart from these protected characteristics, an insult can be targeted at a person's mental or intellectual status, or at the victim's physical characteristics – such as size, shape, or stature. Instances of these sorts are perhaps rare. These kinds of insult, alluding to objective facts, require to be extreme, vile, or invective. Admittedly, as discussed in point c) below, such insults may only be considered as *sufficiently grave* to be *actionable* when an aggravating factor is involved.

³²⁴ See section 2.23521.

³²⁵ See Parkes (n 294) at para 8.04.

³²⁶ Equality Act 2010 ss 4 and 26.

b) Distinction between factual and non-factual imputations

It is important to distinguish between factual and non-factual imputations. Only factual imputations – insults based upon fact – can be found as true or false. The position is more complex when it comes to insults based on qualities such as beauty or ugliness. Comments on beauty or ugliness are arguably more value judgments or subjective appreciations rather than descriptions of fact. Clearly context is important. For instance, if a person's face has actually been deformed as a result of his/her participation in active military service, insulting him/her for having a distorted face may be considered a description of fact. In ordinary circumstances, however, simply calling someone a beautiful or an ugly person is a *subjective comment* rather than an assertion of fact. Where the content of the statement cannot be regarded as capable of objective truth or falsity, no question of truth as a complete defence will arise. The law of defamation can function as usual and the core issue would simply be whether or not the impugned statement is defamatory.³²⁷ The reasoning in *Berkoff v Burchill* in a sense reflects this analysis. In this case, where the plaintiff was described as *hideously ugly*,³²⁸ Phillips LJ pointed out that 'a statement that a person is ugly, or hideously ugly, is a statement of subjective appreciation of that individual's features. To a degree both beauty and ugliness are in the eye of the beholder'.³²⁹ Since a statement about a person's ugliness is not an allegation of fact, truth as a complete defence should not be a consideration in this case. Indeed, the analyses of the three Lord Justices revolved mostly around whether the statement can be found as defamatory, whether the plaintiff would be exposed to ridicule, be avoided or shunned by right-thinking people.³³⁰

Likewise, this analysis might also be applied to other non-factual, metaphorical, or

³²⁷ Certainly, dependent upon the contexts of the case, the defender might be able to raise other kinds of defence.

³²⁸ The defendant referred to the plaintiff as a 'notoriously hideous-looking' person, and opined that the Creature in the film *Frankenstein* looks like the plaintiff, but 'marginally better-looking'. See *Berkoff v Burchill* [1997] EMLR 139 at 141 per Neill LJ.

³²⁹ *ibid* at 154 per Phillips LJ.

³³⁰ *ibid* at 150-156. In the end both Neill LJ and Phillips LJ held that the disputed statement was capable of exposing the plaintiff to ridicule and this issue should be further considered by the jury.

figurative statements.³³¹ Namely, if the imputation at issue is not susceptible to being proved true or false, the defence of truth cannot serve in the law of defamation. In consequence, the key issue is whether or not these figurative or metaphorical imputations are to be considered as defamatory and whether or not they have the potential to bring about serious harm to one's reputation. As discussed above in 2.23521, if the figurative or metaphorical imputations fail to cause sufficiently serious harm to a person's *reputation* to be defamatory, the conduct pattern of *insult* (of this tort) may accord protection against (serious) harm to *dignity or mental integrity* under qualified circumstances.³³²

c) Circumscribed protection against insulting but true statements

As discussed above, the actionability of insulting statements or abusive conduct under the head of the *Wilkinson* tort is limited. In ordinary life *insulting but true* language is often uttered and heard. Although such conduct may be offensive, insulting or ridiculing a friend, colleague, or even a customer, for what they have done, or for their physical appearance or size should not be easily actionable, otherwise the courts might be inundated with trivial quarrels. Over and above the three *Rhodes* requirements,³³³ aggravating factors should be required. For instance, insulting a person as psychopathic or deranged may be actionable under the head of the *Wilkinson* tort where that person has been humiliated and/or manipulated in such a way as intentionally to exploit his or her emotional fragility or psychiatric history.³³⁴ In addition, insulting a poorly-performing colleague in the workplace by accusing him or her of being extremely stupid, or educationally subnormal, may also constitute an actionable wrongdoing of this kind where there has been an abuse of power or unequal status.³³⁵ In these limited circumstances, the *Wilkinson* or *Rhodes* tort can possibly offer a remedy against insulting, abusing, *but true* statements.

³³¹ Regarding examinations of 'non-factual imputations by use of figurative or satirical language' in Scots verbal injury cases, see Reid (n 132) paras 8.29-8.32.

³³² See discussions in 2.23521.

³³³ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

³³⁴ Adapted from the contexts of *Boothman v R* (n 75); *Timmermans v Buelow* (n 69).

³³⁵ Adapted from the contexts of *Smith v Alwarid* (n 241); *Boucher v Wal-Mart Canada Corp* (n 9).

2.23524 Concluding observations

The discussion above suggests that there are three situations in which the law of defamation offers no remedy but insult may be actionable under the head of this tort: 1) where the (insulting) imputation has not surmounted the threshold of ‘serious harm’ to reputation; 2) where the extent of publication has been limited; and 3) where the (insulting) imputation was true. However, it should be acknowledged that, in most cases, the actionability of *insult* under the head of this tort may further depend on the presence of other aggravating factors.

2.236 The boundary between this conduct pattern and invasion of privacy

An attempt will now be made to demarcate the boundary between this conduct pattern (in this tort) and invasion of privacy (in particular the tort of misuse of private information). Are there certain types of wrongdoing which lie beyond the reach of the existing law of privacy but for which a remedy may be found in this tort?

2.2361 The emergence of the tort of misuse of private information

Several of the cases reviewed above have a bearing upon the privacy issue. Though the protection of privacy may have different facets,³³⁶ most litigation hitherto has revolved around the dissemination of information.³³⁷ Claims in this regard used to be dealt with through two main routes³³⁸ – either under the head of breach of confidence, or by reference to the (now replaced) Data Protection Act 1998.³³⁹ In practice in the past breach of confidence played a much more crucial role than Data Protection Act

³³⁶ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 at para 12 per Lord Nicholls.

³³⁷ NA Moreham, ‘The Nature of the Privacy Interest’ in NA Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, 2016) 42 at para 2.11.

³³⁸ J Rushbrooke and A Speker, ‘Breach of Confidence’ in NA Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, 2016) 149 at para 4.01.

³³⁹ Data Protection Act 1998 has now been superseded by the Data Protection Act 2018.

1998.³⁴⁰ However, after the decision of the House of Lords in *Campbell v MGN Ltd*,³⁴¹ a new tort has grown out of and been differentiated from breach of confidence as an equitable wrong in England.³⁴² This new tort – ‘misuse of private information’ – is ‘of most relevance in the majority of privacy cases involving the media’ at the present stage.³⁴³

On the basis of *Campbell v MGN Ltd*, in terms of the essentials of the new tort of ‘misuse of private information’, two main questions arise. The first question is *whether or not the disclosed information is private*, and in this connection reference may be made to Article 8 of the European Convention on Human Rights.³⁴⁴ The touchstone by which this question can be answered is whether the person has a ‘reasonable expectation of privacy’³⁴⁵ with regard to the misused information.³⁴⁶ The question whether there was a ‘reasonable expectation of privacy’ can be considered as a ‘threshold test’.³⁴⁷ Where this first test has been met, ‘the claimant’s interest in keeping the information private’ must then be balanced against ‘the countervailing interest of the recipient in publishing it’.³⁴⁸ The second question is *whether the right to respect for private life should outweigh the right to freedom of expression?*³⁴⁹ In this balancing exercise, the court must give effect to the principle of proportionality,³⁵⁰ taking into account relevant factors such as ‘contribution to a debate of general

³⁴⁰ Rushbrooke and Speker (n 338) at para 4.01.

³⁴¹ *Campbell v MGN Ltd* (n 336).

³⁴² Sir M Warby, A Garrick and C Strong, ‘Misuse of Private Information’ in NA Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, 2016) 211 at para 5.09; Reid (n 132) para 14.41.

³⁴³ Rushbrooke and Speker (n 338) at para 4.02.

³⁴⁴ Warby, Garrick and Strong (n 342) at paras 5.14 and 5.15.

³⁴⁵ *Campbell v MGN Ltd* (n 336) at para 21 per Lord Nicholls. Also see Reid (n 132) para 14.03.

³⁴⁶ In a recent Supreme Court ruling the importance and relevancy of the ‘reasonable expectation of privacy’ test have been revisited and reaffirmed. See *In the matter of an application by JR38 for Judicial Review* [2015] UKSC 42; [2016] AC 1131 at paras 88, 93, 95 and 98 per Lord Toulson with whom Lord Hodge agrees; at paras 109-110 per Lord Clarke with whom Lord Hodge agrees. Also see *Richard v BBC* [2018] EWHC 1837 (Ch) at para 230 per Mr Justice Mann.

³⁴⁷ *Campbell v MGN Ltd* (n 336) at para 137 per Baroness Hale.

³⁴⁸ *ibid*. The two competing interests here are commonly recognised as the rights protected under Article 8 and Article 10 of the European Convention on Human Rights. Article 8(1): ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’ Article 10(1): ‘Everyone has the right to freedom of expression...’.

³⁴⁹ *ibid* at paras 112-124 per Lord Hope; at paras 134-140 per Baroness Hale. Also see Warby, Garrick and Strong (n 342) at paras 5.16-5.18.

³⁵⁰ *Campbell v MGN Ltd* (n 336) at para 20 per Lord Nicholls; at para 140 per Baroness Hale.

interest', the 'content, form and consequences of the publication' and so on.³⁵¹

2.2362 The boundary between infringement of privacy and insult (under the head of the *Wilkinson* tort)

The tort of misuse of private information is now clearly established in English law, although the situation in Scots law is less settled, due to the scarcity of modern cases decided on the footing of misuse of private information.³⁵² A comparison will now be made between insult (under the head of the *Wilkinson* tort) and the tort of misuse of private information.

2.23621 Insult in comparison to misuse of private information

Insult (under the head of the *Wilkinson* tort) and the tort of misuse of private information can be regarded as sharing the following similarities:

Firstly, like insult, misuse of private information centres upon safeguarding human dignity.³⁵³ An injury to reputation is not an essential element of misuse of private information, although the 'protection of reputation' is admitted as 'part of the function of the law of privacy'.³⁵⁴ In other words, unlike defamation, compensation can be granted (for the injured dignity or mental integrity) in the absence of any (serious) harm to reputation. Secondly, as is the case with insult, *publication* or *disclosure* is not a required element of the tort of misuse of private information. The tort of misuse of private information may protect reputation but does not require reputation to have been damaged – the claimant's good name in the estimation of (right-thinking) people.

³⁵¹ Other relevant factors see *Richard v BBC* (n 346) at para 276 per Mr Justice Mann.

³⁵² Reid (n 132) para 14.46. Cameron (n 140) para 4-14. See also *X v BBC* 2005 SLT 796. This is a case involving interim interdict in which the pursuer referred to misuse of private information in her pleadings and the court appeared to follow the reasoning recently applied in *Campbell v MGN Ltd* in granting interdict.

³⁵³ *Campbell v MGN Ltd* (n 336) at paras 50-51 per Lord Hoffmann.

³⁵⁴ *Richard v BBC* (n 346) at para 345 per Mr Justice Mann.

Publication or *disclosure* is thus less decisive. Thirdly, as with insult, the statement or the misused information at issue can be true or false. As shown in past actions based upon misuse of private information, this tort is mostly applied to disclosure of *true* information.³⁵⁵ However, as Lord Justice Longmore commented in *McKennitt v Ash*, truth or falsity is not a relevant concern of an action founded on misuse of private information.³⁵⁶ Fourthly, in the law of misuse of private information, a threshold of seriousness or non-triviality has been required in relation to the misused information or the effect of the misuse or disclosure.³⁵⁷ Likewise, an insult at a trivial level is not actionable but has a remedy only in ‘relatively limited and extreme’ conditions.³⁵⁸

On the other hand, insult (under the head of the *Wilkinson* tort) and the tort of misuse of private information may differ in the following aspects:

Firstly, as the title indicates, some *misuse* (of information) is required to trigger liability. Since in practice most actions concerning privacy arise out of the *dissemination* of information,³⁵⁹ it is usually not difficult for this requirement (of *misuse*) to be satisfied. As the term *misuse* primarily denotes *wrong or improper use*,³⁶⁰ it is arguable that simply accessing or obtaining private information without further using it may not constitute *misuse*.³⁶¹ In contrast, *misuse* (of information) is not a prerequisite of liability for insult (under the head of the *Wilkinson* tort). Insulting or abusive conduct need not involve *misuse* of information. Secondly, the misused

³⁵⁵ J Hartshorne, ‘An Appropriate Remedy for the Publication of False Private Information’ (2012) 4 JML 93 at 95; Warby, Garrick and Strong (n 342) at paras 5.30-5.32.

³⁵⁶ *McKennitt v Ash* [2006] EWCA Civ 1714 at para 86 per Lord Justice Longmore.

³⁵⁷ Warby, Garrick and Strong (n 342) at paras 5.154-5.157. Also see *M v Secretary of State for Work and Pensions* [2006] UKHL 11; [2006] 2 AC 91 at para 83 per Lord Walker; *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307 at para 28 per Lord Bingham.

³⁵⁸ *Rhodes v OPO* (n 1) at paras 107-109 per Lord Neuberger.

³⁵⁹ See Moreham, ‘The Nature of the Privacy Interest’ (n 337) at para 2.11.

³⁶⁰ As regards definitions of *misuse*, see the *Oxford English Dictionary*.

³⁶¹ What occurred in *Beyts v Trump International Golf Club Scotland Ltd* may be a good instance. The employee of the defender took a photo of the pursuer when she was urinating in the dunes, without further using the photo, and then deleting it. The pursuer brought a claim on the basis of the Data Protection Act 1998, without mentioning the tort of misuse of private information. A possible reason is that the defender may *not* be taken as *misusing* the private information. Regarding the contexts of this case, see *Beyts v Trump International Golf Club Scotland Ltd* [2017] SC EDIN 21 at para 12 per Sheriff Donald Corke.

information requires to be *private*, and, before striking a balance between competing interests, the core question to be answered is whether the claimant has a ‘reasonable expectation of privacy’ respecting the misused information.³⁶² In contrast, insulting statements (or conduct) do not necessarily entail private information or interference with one’s expectation of privacy. An insult can be levelled in a variety of manners, which do not need to involve *private* information. Thirdly, as mentioned above, truth or falsity is *not* a crucial concern for either the tort of misuse of private information or insult (under the head of the *Wilkinson* tort). Nevertheless, a difference still exists. In respect of the former, most of the cases relate to the dissemination of *true* information, whilst cases of insult based upon *true* facts are much fewer, and they are unlikely to be actionable unless the insult at issue is accompanied by aggravating factors or other conduct patterns.³⁶³

In sum, on the basis of the foregoing comparison, it seems arguable that insult (under the head of the *Wilkinson* tort) may provide legal protection beyond the reach of the tort of misuse of private information. It may apply where *no private* information is involved – e.g. where abusive statements unrelated to the victim’s private life are uttered. Moreover, even if *private* information is involved, insult (under the head of the *Wilkinson* tort) may apply where there is *no misuse* of that information. For instance, in the absence of any attempt to acquire or distribute the private information, the wrongdoer happens to witness or hear others’ private affairs. If the wrongdoer proceeds to insult the person concerned on the basis of that private information (without disclosing the information to any other third party), it seems that the victim could have a case only on the footing of the *Wilkinson* tort,³⁶⁴ although only under limited circumstances.³⁶⁵

Where insulting or abusive conduct involves both of the elements of *misuse* and

³⁶² *Campbell v MGN Ltd* (n 336) at para 21 per Lord Nicholls. Also see Reid (n 132) para 14.03.

³⁶³ See the analysis in 2.23523 (c).

³⁶⁴ Notably, this wrongdoing may not be covered by the Data Protection Act 2018 either, since it does not meet the provided definition of ‘processing’ (of personal data). See Data Protection Act 2018 s 3(4).

³⁶⁵ As analysed in section 2.23523 (a) and (c), this sort of insult may only be actionable when it is sufficiently serious or accompanied by aggravating factors.

private information, it seems more likely that a litigant would choose to proceed on the footing of misuse of private information. The above comparison indicates that the requirements of the tort of *Wilkinson* or *Rhodes* are more difficult to meet than those of the tort of misuse of private information, since there is no need to establish intention, nor is there any threshold as regards the harm caused. By contrast, the *Wilkinson* and *Rhodes* tort requires that the element of intention and the element of consequence (physical harm or recognised psychiatric illness) are both established. This marker of difference was reflected in the Australian case of *Giller v Procopets*, where the videotapes of private sexual activities between the two parties had been disclosed,³⁶⁶ and recovery was granted on the footing of breach of confidence.³⁶⁷ The claim based on intentional infliction of emotional distress failed because the majority of the court did not regard the requisite harm element of the *Wilkinson* tort as having been met.³⁶⁸ Thus the essential requirements of the *Wilkinson* tort may be less readily fulfilled than those of misuse of private information (or, as in *Giller*, breach of confidence).

2.23642 Beyond misuse of private information – the applicability of this tort

a) Incomplete protection granted to physical privacy

According to the European Court of Human Rights, the right protected under Article 8 ‘covers the physical and psychological integrity of a person’. A person’s body is acknowledged as ‘the most intimate aspect of one’s private life’.³⁶⁹ Nevertheless, the legal protection given to physical privacy seems to be incomplete in England and in Scotland. Moreham commented that no particular protection is provided to physical privacy in terms of English law.³⁷⁰ Non-informational privacy or physical privacy is protected merely by ‘a piecemeal collection of common law actions and legislative

³⁶⁶ *Giller v Procopets* (n 199) at paras 124-125 per Ashley JA.

³⁶⁷ *ibid* at para 129 per Ashley JA.

³⁶⁸ *ibid* at paras 164-165 per Ashley JA; at paras 471-478 per Neave JA. In this case, Ms. Giller merely suffered from emotional distress without developing any recognised psychiatric injury.

³⁶⁹ *YF v Turkey* (2004) 39 EHRR 34 at para 33.

³⁷⁰ Moreham, ‘The Nature of the Privacy Interest’ (n 337) at para 2.37.

measures'.³⁷¹ This observation is based upon the examination of a variety of relevant legislation and common law torts, in regard to the potential protection they could offer, as well as their limits. In this connection, it should be noted that protection can be afforded against the processing of personal data 'wholly or partly by automated means' or against the processing, by other non-automated means, of personal data 'which form part of a filing system or are intended to form part of a filing system'.³⁷² Recital 15 to the GDPR (General Data Protection Regulation) also indicates that 'the protection of natural persons should be technologically neutral and should not depend on the techniques used'. As long as 'the personal data are contained or are intended to be contained in a filing system', even 'manual processing' would be covered by this Regulation.³⁷³ In the light of the scope of current Data Protection legislation,³⁷⁴ as well as Moreham's survey, it seems discernible that *no* protection would be rendered against an invasion of physical privacy, which is committed by a person who is *not* a public official³⁷⁵ under the following circumstances:

*a one-off³⁷⁶ observing or listening to a person without collecting³⁷⁷ any personal data; or without using automated devices or intending to place personal data into a filing system;³⁷⁸

*a one-off observing or listening to a person's home without collecting any personal data; or without using automated devices or intending to place personal data into a filing system;

*a one-off taking photos or recording activities or conversations in relation to a person or his/her home, without using automated devices or intending to place personal data

³⁷¹ NA Moreham, 'Intrusion into Physical Privacy' in NA Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, 2016) 429 at para 10.03.

³⁷² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119 Article 2(1); Data Protection Act 2018 ss 4 and 21.

³⁷³ See Recital 15 to the GDPR.

³⁷⁴ See Data Protection Act 2018.

³⁷⁵ Where public authorities are involved in committing these wrongdoings, the Regulation of Investigatory Powers Act 2000 and the Human Rights Act 1998 would probably apply.

³⁷⁶ Multiple or a course of conduct could be covered by the Protection from Harassment Act 1997.

³⁷⁷ 'Collection' is also treated as a form of 'processing'. See Data Protection Act 2018 s 3(4); GDPR Article 4(2).

³⁷⁸ GDPR Article 2(1); Data Protection Act 2018 ss 4 and 21.

into a filing system.

As for Scots law, it has been argued that the protection accorded to ‘territorial privacy’ and ‘privacy of the person’ is at best uncertain.³⁷⁹ In respect of ‘territorial privacy’, where the wrongdoer is not a public authority, the ‘remedies for infringement of the privacy of the home’ were left unclear after the decision in *Martin v McGuinness* and require further to be elaborated.³⁸⁰ In respect of the privacy of the person, based upon Scots authorities as *Henderson v Chief Constable, Fife Police*³⁸¹ and *McKie v Chief Constable, Strathclyde Police*,³⁸² Reid observed that interferences with personal privacy in Scots law ‘are in principle recognised as a wrong’, yet ‘the basis for civil remedies against intrusion cannot be regarded as securely established’.³⁸³ On the basis of the above, and taking into account the GDPR and the Data Protection Act 2018, it seems unclear in Scots law in the following situations whether legal protection could be provided against the invasion of physical privacy:

*On only one occasion,³⁸⁴ a person who is not a public authority³⁸⁵ observes, listens to, or even enters others’ home, without collecting any personal data,³⁸⁶ or without using automated devices or intending to place personal data into a filing system,³⁸⁷

³⁷⁹ Reid (n 132) chs 17 and 19.

³⁸⁰ *ibid* para 17.05. The uncertainty is left by the decision of *Martin v McGuinness*, in which a private investigator employed by the defender pretended to be a previous colleague of the pursuer, visiting his house, interviewing his wife, observing the house, and filming ‘events in the garden’. Despite viewing the wrongdoing on the part of the private investigator as capable of infringing the pursuer’s right of Article 8(1) ECHR, Lord Bonyon opined that the conduct in dispute could be justified by Article 8(2) ECHR, and the evidence produced by the investigator was admissible. See *Martin v McGuinness* 2003 SLT 1424 at paras 8, 12, and 17 per Lord Bonyon.

³⁸¹ *Henderson v Chief Constable, Fife Police* 1988 SLT 361.

³⁸² *McKie v Chief Constable, Strathclyde Police* 2002 Rep LR 137.

³⁸³ Reid (n 132) at para 17.09.

³⁸⁴ On *more than one* occasion the Protection from Harassment Act 1997 may apply.

³⁸⁵ If these wrongdoings are committed by a public official, the Regulation of Investigatory Powers (Scotland) Act 2000 and the Human Rights Act 1998 would probably apply. Also see Reid (n 132) paras 19.60-19.61.

³⁸⁶ ‘Collecting’ personal data would constitute the ‘processing’ of personal data. See Data Protection Act 2018 s 3(4); GDPR Article 4(2).

³⁸⁷ GDPR Article 2(1); Data Protection Act 2018 ss 4 and 21. Prior to the presence of the GDPR and the Data Protection Act 2018, provided automated or digital devices were used, these deeds might be covered by the Data Protection Act 1998. For instance, the installation of CCTV equipment for the purpose of covering others’ private residence without giving notice and providing information can be a breach of the 1998 Act. See *Woolley v Akram* [2017] SC EDIN 7.

*On only one occasion, a person who is not a public authority observes, listens to other persons, without collecting any personal data, or without using automated devices or intending to place personal data into a filing system;

*On only one occasion, a person who is not a public authority takes photos or records activities or conversations in relation to others' home or person, without using automated devices or intending to place personal data into a filing system.

As can be observed, the circumstances listed above in respect of the Scots law substantially overlap with those in respect of the English law. Whether, under these circumstances, there is scope for this conduct pattern (under the head of the *Wilkinson* tort) to function will be analysed below.

b) The applicability of this tort

Under the above circumstances, where there has been an invasion of physical privacy and statutory regulation and common law torts have reached their limits, there is scope for insulting/abusive conduct (under the head of the *Wilkinson* tort) to serve a function. The case of *C v D, SBA* may be a useful illustration as to where this tort could be relevant. In this case, in addition to battery or assault,³⁸⁸ the (first) defendant – the claimant's headmaster³⁸⁹ – had wronged the claimant in two different ways: (1) filming the claimant with a video camera when he was taking a shower together with his classmates;³⁹⁰ and (2) on an occasion exploiting his vulnerability, undressing him when he had been taken unwell and staring at his genitals for several minutes.³⁹¹ It is apparent that the second incident falls beyond the remedies provided by current legislation and other recognised torts. Whether the first wrongdoing can be covered by the GDPR or the Data Protection Act 2018 is more uncertain, depending on whether 'automated means' were used or whether the acquired personal data were 'intended to be contained in a filing system'. However, since the conduct predated the enactment

³⁸⁸ *C v D, SBA* (n 213) at paras 84 and 87 per Mr Justice Field.

³⁸⁹ *ibid* at para 2 per Mr Justice Field.

³⁹⁰ *ibid* at paras 4, 10, and 97 per Mr Justice Field.

³⁹¹ *ibid* at paras 4, 12, and 98 per Mr Justice Field.

of both the Protection from Harassment Act 1997 as well as the Data Protection Act 1998,³⁹² it was addressed on the footing of *Wilkinson v Downton*. Certainly, the limits of the *Wilkinson* tort lie in its three essential requirements, which are not so easy to surmount. The first wrongdoing of filming the claimant while he was taking a shower was held by the court as having ‘caused only emotional distress’ and ‘not actionable’, whereas the second wrongdoing of undressing someone and staring at his genitals was found to be ‘a gross invasion of his personal integrity’ and therefore recoverable.³⁹³ Thus a claimant who has experienced an invasion of physical privacy similar to that reported in *C v D, SBA* may establish a valid claim, although only if he or she can satisfy the three elements indicated in *Rhodes v OPO*.³⁹⁴

It is possible to take the fact pattern of *Wainwright v Home Office* in order to explore further where this tort might apply. Despite the European Court of Human Rights having found the manner of strip-search carried out in *Wainwright* as being ‘a breach of Art.8 of the Convention’,³⁹⁵ a question mark remains as to the remedy provided by the English law of tort in this situation.³⁹⁶ Moreover, if the infringement is carried out by a private person or entity, there is no possibility of direct action under the Human Rights Act 1998. For example, suppose the victim is accused of shoplifting in a supermarket and complies with the store detective’s request that he or she undergoes a strip-search before leaving the supermarket. As a result of the search, the victim suffers from significant emotional distress which turns into recognised psychiatric illness later. In this hypothetical case, there would be no recovery on the basis of invasion of privacy. However, there is a statable case on the basis of the *Wilkinson* or *Rhodes* tort, provided the required elements have been met.

In the absence of a tort specific to physical privacy (which in the view of some commentators would be a desirable development³⁹⁷), providing a remedy for insulting

³⁹² These wrongdoings were committed during the period between 1989 and 1993. See *ibid* at para 2 per Mr Justice Field.

³⁹³ See *ibid* at paras 97, 98, 100 per Mr Justice Field.

³⁹⁴ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

³⁹⁵ *Wainwright v United Kingdom* (2007) 44 EHRR 40 at para 49.

³⁹⁶ Reid (n 132) para 17.07.

³⁹⁷ As to developing an ‘Intrusion into Physical Privacy Action’, see Moreham, ‘Intrusion into

or abusive conduct (under the head of the *Wilkinson* tort) has the potential to address wrongdoing of this nature, under limited conditions. The terminology of the court in *C v D, SBA* in branding the defendant's conduct as a 'a gross invasion of his personal integrity',³⁹⁸ and thus recoverable on the basis of the *Wilkinson* tort, implies the possible role to be played by the *Wilkinson* tort in the realm of physical privacy.

2.24 Conduct inflicting mental harm through injury to a third party – issues as regards 'secondary victims'

Inflicting mental harm upon the victim through occasioning injury to a third party is the most distinctive feature of the conduct pattern of this section. The wrongdoing at issue is directed at a third party, who is the immediate target and the primary victim of the wrongdoing. The mental harm is inflicted upon the claimant in an *intentional but indirect* way, through the claimant's perception of injury caused to the third party. The infliction of mental harm is incidental or secondary to the causation of injury to the primary victim. Accordingly, the claimant should be taken as a secondary or indirect victim, whilst the victims of the foregoing three conduct patterns should be treated as primary or direct victims. As the conduct pattern of this type is closely intertwined with other essential requirements as regards secondary victim claims, they will be explored altogether in Chapter 5 – secondary victims in the field of intentional infliction of mental harm.

2.25 Conclusion on conduct patterns

In the light of English and Commonwealth authorities in relation to the *Wilkinson* tort, the typical types of conduct which have hitherto been held as actionable, can be

Physical Privacy' (n 371) at paras 10.82-10.98. Comparably, Reid also argues that in order to offer adequate protection to privacy or other personality interests, 'liability cannot be restricted to malicious infringement', since 'infringement of privacy is seldom malicious in the sense of any specific intention or desire to harm the pursuer'. See Reid (n 132) para 17.13.

³⁹⁸ *C v D, SBA* (n 213) at para 98 per Mr Justice Field.

classified under four heads: 1) playing on or interfering with victims' emotional bonds with their nearest and dearest (mostly) through false statements; 2) threats or coercion; 3) insults or other abusive conduct; 4) inflicting mental harm through injury to a third party. A residual category of 'other conduct patterns' could also be added in order to signify that the preceding four are *not exhaustive* classifications. Moreover, the review of the authorities above indicates the importance of taking into account the *gravity* of the disputed conduct, or *aggravating factors*. As analysed in section 2.12, although five aggravating factors are frequently observed, the falsity of the statement, exploiting the victim's vulnerability and abusing power or unequal status are of most relevance to the conduct element of this tort.³⁹⁹ Falsity is particularly relevant to the first category of conduct. The conduct patterns of this tort can be constructed through a combination of the five types of conduct with the three aggravating factors, as listed in section 2.13.

The first conduct pattern is playing on or interfering with victims' emotional bonds with their nearest and dearest, (mostly) through false statements. The disputed conduct of this pattern requires to reach a significant level of gravity. Arguably, the falsity of the statement is neither a sufficient nor a necessary condition of this conduct pattern, but it can be taken as an aggravating factor that heightens the gravity of the conduct. The reasonable belief of the victim in the statements is also an indispensable factor connecting the wrongdoer's conduct to the emotional reaction of the victim. The abuse of power or status has been observed as an aggravating factor for this conduct pattern, since the authority enjoyed by the wrongdoer would make his/her story more credible and therefore more likely to injure. This tort can provide a remedy which is unavailable in the field of deceit/fraud, where mental harm arises as a result of the victim's belief in the (false) statement rather than the victim being induced to act to his or her detriment.

The second conduct pattern is using threats to coerce the victim into conduct which has negative consequences for him or her. Falsity (of the statement) is not generally a

³⁹⁹ Although *unlawful motive* can arguably heighten the gravity of conduct, it is more related to the mental element of this tort.

characteristic of such cases. Whether or not falsity can be taken as an aggravating factor in relation to threats is more uncertain. The victim must have (reasonable) belief that the wrongdoer would carry out the threat. The authorities indicate that exploitation of the victim's vulnerability and abuse of power or unequal status are aggravating factors in this context. Arguably, they may either heighten the existent gravity of the wrongdoer's conduct, or even transform otherwise non-tortious into tortious conduct. In most of the cases considered where the wrongdoer abused power in conjunction with threats, the wrongdoer did *not* exercise the power or authority for a legitimate purpose or in an appropriate manner. Comparing this conduct pattern to the tort of assault, this tort may potentially provide a legal remedy where the threatened consequences involve *no physical injury, force, or contact*. In comparison to this tort, the potential applicability of the statutory tort of harassment is obviously much wider. Where wrongdoing is recurrent this tort is overshadowed by the Protection from Harassment Act 1997, leaving this tort with a role to play in cases where the disputed wrongdoing occurs merely once.

The third conduct pattern is insulting or other abusive conduct. Insulting or other abusive conduct does not need to cause (serious) harm to one's reputation, nor does it need to be false. In the cases considered, insulting or abusive conduct, standing on its own, has not been explicitly recognised as actionable but may be so where there are aggravating factors. The aggravating factors – exploiting the victim's vulnerability or abusing power/unequal status – may heighten the seriousness of the insulting or abusive conduct, or even form an essential and inseparable part of the gravity and actionability of the wrongdoing. It is arguable that this tort can provide a remedy in the following three circumstances which are beyond the reach of the law of defamation: 1) where the (insulting) imputation has not surmounted the threshold of 'serious harm to the reputation'; 2) where the extent of publication is regarded as limited; and 3) where the (insulting) imputation is true. However, in most cases, insult is actionable only in the presence of other aggravating factors. It is further arguable that this tort can provide a remedy for insulting/abusive behaviour in circumstances where the tort of misuse of private information does not apply, namely where no *private* information is involved, or there is no *misuse* of information. Moreover, there

is scope for this tort to serve a function in situations where the statutory enactments and common law torts fail to provide protection against the invasion of *physical privacy*, as listed in section 2.23642 (a).

The fourth conduct pattern – inflicting mental harm through injury to a third party – will be explored in Chapter 5.

In sum, it is clear that the territory occupied by the existing English torts, and arguably also the law of delict in Scotland, leaves a number of significant gaps in protecting the rights of the person. The tort/delict under discussion here has an important role to play in filling those gaps.

Part C

2.3 Justification or excuse

2.31 Defence or an integral part of conduct element?

The judgment of the majority in the Supreme Court in *Rhodes* stipulated that the conduct element of this tort was ‘words or conduct directed at the claimant’ for which ‘there is no justification or excuse’.⁴⁰⁰ But did the Supreme Court simply mean that, in respect of this tort, defendants could cite certain justifications or excuses in their *defence*? Or did the Supreme Court intend ‘the absence of justification or excuse’ to be an integral part of the conduct element? What is the difference between these two approaches? In this connection it is helpful to make reference to the analysis of tort law defences recently published by James Goudkamp.

2.311 Separating definitional elements of torts from defences

Goudkamp distinguishes the *definitional elements of torts* from *defences*, but notes that ‘any issue could be placed on either side of the equation’.⁴⁰¹ Since definitional elements are what constitute the tortious wrong at issue, from Goudkamp’s point of view, to assert the absence of one or several *definitional elements of a certain tort* is a *denial* – denying that all of the requirements of the disputed tort have been satisfied,⁴⁰² and therefore denying liability. In contrast, to raise a defence is ‘*not* denying that he committed a wrong’, but *explaining* why the defendant committed the wrong, as well as why he should be released from liability.⁴⁰³ Goudkamp points out that many

⁴⁰⁰ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

⁴⁰¹ J Goudkamp, *Tort Law Defences* (first published 2013, reprinted 2016) 34. As regards the interplay of torts elements and defences, also see A Dyson, J Goudkamp and F Wilmot-Smith, ‘Central Issues in the Law of Tort Defences’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (2015) 3 at 11-12.

⁴⁰² Goudkamp (n 401) 46-47.

⁴⁰³ *ibid* at 76-78. Notably, Goudkamp terms his account of defence/justification as the ‘radical view’,

practitioners and scholars do not consider the demarcation between the *elements of torts* and *defences* to be important, as it does not matter so much ‘whether liability is withheld on the basis that an element of the tort in which the claimant sues is absent, or on the ground that the defendant has a defence’.⁴⁰⁴ Furthermore, technically speaking, every defence can be converted into a definitional element of torts, and vice versa.⁴⁰⁵ For instance, the plea of ‘consent’ serves as a justificatory defence in many torts. However, it is technically possible that its negative counterpart – ‘absence of consent’ – can be treated as a definitional element.⁴⁰⁶ Accordingly, the boundary between the *definitional elements of torts* and *defences*, or that between *denials* and *raising defences*, is obscure, even sometimes confusing.⁴⁰⁷ Nevertheless, Goudkamp argues that the separation between tort elements and defences is of significance, particularly in ‘guid[ing] defendants in their conduct by stating clearly when defendants are under a duty to act in a particular way and when they have a privilege to commit torts’.⁴⁰⁸

Two salient points follow which might be of use for investigating the conduct element required in *Rhodes*. First, in practical terms, conduct elements and defences are effectively interchangeable. The boundary between them is unclear and underexplored. Secondly, it is nevertheless arguable that a separation between conduct elements and defences is significant in respect of guiding potential defendants how to behave. Adopting the presence of a justification or excuse as a defence or including the absence of justification or excuse in the conduct element are different approaches, but both can be meaningful. Did the Supreme Court in *Rhodes* favour one approach over the other?

in contrast to the ‘conventional view’ that regards defences or justifications as ‘denying’ wrongdoing or wrongfulness. A parallel ‘radical view’ in relation to the definition of defence seems to be employed in *Clerk & Lindsell on Torts*, see Clerk and Dugdale (n 41) para 3-01.

⁴⁰⁴ Goudkamp (n 401) 41.

⁴⁰⁵ *ibid* 34.

⁴⁰⁶ As to the controversies over whether consent/absence of consent should be treated as a defence or a definitional element in respect of the tort of trespass to the person, see *ibid* 65-67.

⁴⁰⁷ ‘Unfortunately, the line between a failure to establish *prima facie* liability and a successful plea of a general defence is not always clear.’ See Clerk and Dugdale (n 41) para 3-01.

⁴⁰⁸ Goudkamp (n 401) 42.

2.312 The stance of the Supreme Court in relation to this tort

The more credible interpretation is that the Supreme Court in *Rhodes* treated ‘the absence of justification or excuse’ as an integral part of the conduct element. Various elements in its reasoning point in that direction. First of all, immediately after stipulating that the conduct element of this tort should be words or conduct directed towards the claimant ‘for which there is no justification or reasonable excuse’, Lady Hale and Lord Toulson indicated that ‘the burden of proof is on the claimant’.⁴⁰⁹ They *did not separate* the onus of proving ‘(no) justification or reasonable excuse’ from the burden of proving the impugned conduct. In addition, if the qualification of ‘for which there is no justification or reasonable excuse’ is removed, nothing is left in the conduct element except for ‘words or conduct directed towards the claimant’, which is too broad and uncertain to be treated as a stand-alone conduct element. In the circumstances of *Rhodes*, Lady Hale and Lord Toulson did not attempt to separate the two parts. After finding that ‘there is every justification for the publication’,⁴¹⁰ instead of stating that the committed *wrongdoing* could be *justified*, they concluded that the publication at issue did not meet the required conduct element.⁴¹¹ Moreover, Lord Neuberger explicitly indicated that *not* every untruth, threat, or insult that inflicts distress would be ‘civilly actionable’. The criterion of ‘[without] justification or reasonable excuse’ applied by the majority is the ‘second and demanding requirement which has to be satisfied before liability can attach to an untruth, an insult or a threat...’.⁴¹² In contrast to the wording, ‘[without] justification or reasonable excuse’, Lord Neuberger chose the term ‘gratuitous’ and compared it with standards of “outrageous”, “flagrant” or “extreme” as employed in the American and Canadian courts.⁴¹³ These terms clearly are adjectives qualifying the disputed conduct, and cannot therefore be separated from the conduct element. Accordingly, it appears very likely that ‘[without] justification or reasonable excuse’ was used by the Supreme

⁴⁰⁹ *Rhodes v OPO* (n 1) at para 74 per Lady Hale and Lord Toulson.

⁴¹⁰ *ibid* at para 76 per Lady Hale and Lord Toulson.

⁴¹¹ *ibid* at para 90 per Lady Hale and Lord Toulson.

⁴¹² *ibid* at para 110 per Lord Neuberger.

⁴¹³ *ibid*.

Court in *Rhodes* as an integral part of the conduct element of this tort.

2.313 Is the approach of the Supreme Court warranted?

If the stance of the Supreme Court can be construed as treating the *absence* of *justification or excuse* as a part of the conduct element, is this a sound approach? Arguably, this stance is understandable, but not entirely satisfactory, particularly in regard to (distributing) the burden of proof. It is understandable because it signifies that *not* every infliction of severe emotional distress would be wrongful or tortious. The message – tort law only forbids ‘unjustifiable’ or ‘gratuitous’ infliction of severe emotional distress – is thereby conveyed to potential actors. Conversely, treating justifications or excuses as a defence and leaving the conduct element blank⁴¹⁴ implies that every kind of conduct or words inflicting severe emotional distress is a *tortious wrong*, and any one (intentionally) inflicting severe emotional distress upon others is a *wrongdoer*. This suggestion appears unacceptable in the real world, for almost everyone has at some point in time (intentionally) inflicted severe emotional distress upon others.

On the other hand, there are problems with treating absence of justification or excuse as part of the conduct element. The primary issue concerns the burden of proof. If this is part of the conduct element, the onus of proving that ‘there is no justification or reasonable excuse’ rests on the claimant.⁴¹⁵ But how can a claimant prove the *absence* of something? It is difficult, if not impossible, to establish a *negative* proposition of fact or value judgment. The claimant can at best try to prove how egregious the defendant’s wrongdoing was.⁴¹⁶ Secondly, as guidance for the conduct of potential defendants, the wording selected by the Supreme Court may not be clear enough. In comparison with formulations used in other jurisdictions such as “outrageous”,

⁴¹⁴ See *ibid* at para 88 per Lady Hale and Lord Toulson.

⁴¹⁵ *ibid* at para 74 per Lady Hale and Lord Toulson.

⁴¹⁶ As analysed in the above sections, where more conduct patterns as well as aggravating factors are established in one case, the (one-off) wrongdoing in question could be found as more egregious, and more likely the case would be held as actionable.

“flagrant” or “extreme” (conduct)’, the content of ‘unjustifiable’, ‘gratuitous’, or ‘without justification or excuse’ is broad and lacking in specification.⁴¹⁷ In addition, analysis of previous cases suggests that *gravity* is required of the conduct in most cases. However, the terms ‘gratuitous’ or ‘without justification or excuse’ do not necessarily tell us anything about the *gravity* of the impugned conduct. In this regard the criteria of “outrageous”, “flagrant” or “extreme” (conduct)’ give a clearer steer.

Arguably it may be preferable for the future development of this tort to employ a conduct element which is more definite, capable of reflecting the gravity of the conduct, and to remove the controversial qualification of ‘without justification or excuse’, as can be observed in the American and Canadian approaches. As the *gravity of conduct* and *justification for the conduct* are conceptually different, they are better separated. Following this separation, the question whether there is any justification for the disputed conduct in *Rhodes* becomes less urgent, for the publication of one’s life story may not be serious enough to constitute the conduct element of this tort.⁴¹⁸ Once the disputed conduct surmounts the threshold of gravity/seriousness, the question whether it can be justified would then come into play. The more egregious the disputed conduct, the stronger justification it may require. This kind of approach could not only clarify different concepts, sending the message that *not* every infliction of severe emotional distress would be tortious, but also distribute the burden of proof in a better way. With this approach the claimant is no longer required to establish a *negative* proposition of fact or value judgment, but merely needs to prove *what has been done* to him or her, as well as the *egregious nature* of the conduct. The onus of raising a defence – asserting and proving the existence of justification – would be placed upon the defendant. It was argued even before the decision in *Rhodes*, that instead of focusing on the ‘lack of justification’ for the disputed conduct, a better approach might be to develop an independent defence, or a ‘freestanding criterion of “justifiability”’, which could place policy considerations into balance.⁴¹⁹

⁴¹⁷ Lord Neuberger also admitted that ‘virtually every threat, untruth or insult can be said to be unjustified, inexcusable and gratuitous’. See *Rhodes v OPO* (n 1) at para 110 per Lord Neuberger.

⁴¹⁸ Despite being potentially able to inflict mental harm, the nature of this conduct is not egregious at all. In contrast, the impugned wrongdoings in *Wilkinson* and *Janvier* are more serious even outrageous.

⁴¹⁹ For a criterion ‘to determine whether liability ought properly to be precluded’ rather than a

It is a pity that, despite awareness of the American and Canadian requirements for the conduct element, the Supreme Court chose not to follow them or to develop a parallel version, on the ground that these foreign approaches ‘ha[ve] not so far been advanced in this country’,⁴²⁰ and also because they unavoidably involve a ‘subjective judgment’.⁴²¹ Since the *absence of justification or excuse* has now been employed as a part of a definitional element of this tort, it appears unlikely that the defendant could be successful in raising a ‘justificatory defence’, whereas raising a ‘non-justificatory defence’ may still be possible.⁴²² The reason is self-evident. If there are grounds which can rationalise or justify the defendant’s conduct, no wrong will be constituted as the elements of the tort would not be (entirely) satisfied.⁴²³ Thus there is no need and no likelihood for the defendant to raise a defence. However, this reason also reflects the importance of these justificatory grounds. Although they may not be adopted as a defence in relation to this tort, their existence can attack the conduct element and negate liability. The next question to be investigated is as the type of justificatory grounds recognised for the purposes of the tort of intentional infliction of mental harm.

2.32 Possible justifications

According to Goudkamp, tort law defences can be divided into two broad categories – ‘justification defences’ and ‘public policy defences’.⁴²⁴ When raising ‘justification defences’, the defendant asserts that ‘he acted reasonably’ in committing the disputed wrong, and that he should therefore be released from liability.⁴²⁵ In contrast, ‘public

criterion serving ‘to determine liability’, see Ying Khai Liew, ‘The Rule in *Wilkinson v Downton*: Conduct, Intention, and Justifiability’ (2015) 78 MLR 349 at 359-360. (Comment on *OPO v MLA* [2014] EWCA Civ 1277, the Court of Appeal decision.)

⁴²⁰ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

⁴²¹ See *ibid* at para 110 per Lord Neuberger.

⁴²² Dyson, Goudkamp and Wilmot-Smith (n 401) at 11. Defences that are not justificatory are categorised by Goudkamp as ‘public policy defences’. The distinction between ‘justification defences’ and ‘public policy defences’ will be explained in the next section.

⁴²³ *ibid*.

⁴²⁴ Goudkamp (n 401) 76.

⁴²⁵ *ibid*.

policy defences’ are those pertinent to external aims of tort law other than the ‘rational defensibility of the defendant’s conduct’.⁴²⁶ It seems more likely that justificatory grounds which rationalise misdeeds and defeat the conduct element (of this tort) would be found in the former category. Some individual defences – general defences or defences specific to a certain tort – classified under the head of ‘justification defences’, appear relevant. Whether or not the *justificatory grounds underpinning them* could be used in this tort to defeat the conduct element, will be explored as follows.

2.321 Consent

‘Consent’ serves as a justification defence in several torts.⁴²⁷ The rationale of this defence is that ‘[o]ne who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong.’⁴²⁸ When consent is established, delictual liability can be negated or the wrongdoing exculpated.⁴²⁹ Consent can be express or implied.⁴³⁰ It must be given voluntarily and freely,⁴³¹ and its boundaries must be respected. A consent provided for particular conduct cannot be used as the justification for different sorts of conduct, or for conduct that exceeds the scope agreed by the victim.⁴³² Consent can be raised (admittedly unusually) as a defence in respect of the tort of defamation – namely, by asserting that the publication of defamatory statements has the consent of or is authorised by the pursuer.⁴³³

If consent functions as a justificatory defence for the communication of defamatory statements, could it also serve as a justificatory ground for this tort, based on which the conduct element can be defeated and liability can be negated? The first conduct

⁴²⁶ Public policy defences include, for example, ‘judicial process immunities’, ‘parliamentary and executive privilege’, ‘limitation bars’, and so on. See *ibid* 76, 122-135.

⁴²⁷ *ibid* 113.

⁴²⁸ *Smith v Baker* [1891] AC 325 at 360 per Lord Herschell.

⁴²⁹ Clerk and Dugdale (n 41) para 3-104. Also see Walker (n 140) 345.

⁴³⁰ Clerk and Dugdale (n 41) para 3-111.

⁴³¹ Walker (n 140) 345; Reid (n 132) para 3.01.

⁴³² Goudkamp (n 401) 114; Walker (n 140) 345; Reid (n 132) paras 3.01 and 3.02.

⁴³³ Mullis, Parkes and Gatley (n 260) para 10.2; Clerk and Dugdale (n 41) para 22-199; Walker (n 140) 792.

pattern discussed above is playing on the victims' emotional bonds with their nearest and dearest through false statements. Since typically the victim has to be tricked and believe in the false story to be injured, it appears unlikely that the wrongdoer can acquire consent from the victim. As to the second conduct pattern, it also seems contradictory that consent would have been granted to threatening conduct. Threatening involves intimidating the victim with certain *undesired* negative consequences, causing fear and/or distress. It is difficult to imagine that one can knowingly and voluntarily give consent to being threatened, and nevertheless feel intimidated and distressed by the threat. The third conduct pattern concerns insulting or other abusive conduct. It appears more likely that consent could relate to this conduct pattern. Despite consenting to insult, one might nonetheless experience significant emotional distress during insulting or abusive conduct due to the affront to dignity and mental integrity. Assume that students voluntarily participate in an insulting game/competition – primarily hurling insults and curses at each other. Although the participants may be deemed to have consented to each other's wrongdoing in an express or implied way, it is conceivable that some of them would feel severely distressed or injured during or after the game/competition. In the event that an action was brought on the basis of this tort, 'consent' should be available as a justificatory ground to defeat the conduct element of this tort. In other words, the participants can assert that their conduct is *not* gratuitous or unjustifiable, as long as the conduct in question had not gone beyond the bounds of the given consent.

2.322 Discharging duties and exercising rights – a form of privilege

2.3221 In general

The commentary to the American Restatement (Third) of Torts §46 indicates that liability for intentional infliction of emotional harm would be negated where the defendant was 'exercising a legal right'.⁴³⁴ 'The idea that an actor is protected by exercising a legal right is a narrower but comparable concept to the defense of privilege

⁴³⁴ Restatement (Third) of Torts §46 (2012) (n 10) Comment e.

employed for other intentional torts.⁴³⁵ This implies the relevance of privilege (as a justificatory ground) to this tort. In this regard, qualified privilege on the basis of duty and interest in the law of defamation may provide some useful hints. Privilege attaches to otherwise defamatory imputations where ‘the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it’.⁴³⁶ Duty and interest are two pivotal aspects to be considered here,⁴³⁷ in order to facilitate the ‘common convenience and welfare of society’.⁴³⁸ However, qualified privilege is defeated if malice on the part of the defendant is established.⁴³⁹

It is conceivable that the concepts of exercising rights and discharging duties could come into play as justificatory grounds for this tort. It is possible intentionally to inflict mental harm in the course of performing a duty or exercising a right. On these occasions, if we accept that the ‘common convenience and welfare of society’⁴⁴⁰ are more important interests to be protected than the mental integrity of the victim,⁴⁴¹ the discharge of duties or the exercise of rights would be prioritised, and the intentional infliction of mental harm would be justified so that the conduct element of this tort would be defeated.

It should be borne in mind that, in accordance with the commentary to the Restatement (Third) of Torts §46, the exercise of legal rights must be kept within necessary and proportional bounds. If the impugned conduct ‘goes so far beyond what is necessary to exercise the right’, such as ‘an employer who unnecessarily humiliates a fired employee’, this excessive conduct may not be justified.⁴⁴² This point in a sense echoes

⁴³⁵ See *ibid* Reporters’ Note to Comment e.

⁴³⁶ *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson.

⁴³⁷ Mullis, Parkes and Gatley (n 260) paras 14.1 and 14.9; Clerk and Dugdale (n 41) paras 22-107 and 22-108.

⁴³⁸ *Toogood v Spyring* (1834) 1 C M & R 181 at 193 per Parke B.

⁴³⁹ Mullis, Parkes and Gatley (n 260) para 14.1; Clerk and Dugdale (n 41) para 22-96. E Reid, “‘That Unhappy Expression’: Malice at the Margins’ in SGA Pitel, JW Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 441 at 443-444.

⁴⁴⁰ *Toogood v Spyring* (n 438) at 193 per Parke B.

⁴⁴¹ This appears to be the necessary presumption for the following justification. Admittedly, it is not always easy to decide which interest or right should be prioritised.

⁴⁴² Restatement (Third) of Torts §46 (2012) (n 10) Comment e.

the requirement of ‘absence of malice’ in respect of qualified privilege. An unreasonable misuse of the otherwise privileged occasion is often treated as an indication of malice on the part of the defendant,⁴⁴³ which can lead to the defeat of qualified privilege.

2.3222 Examples: discharging duties and exercising rights

In the cases considered above, the considerations of duty and right/interest have rarely been raised and admitted as justificatory grounds in relation to this tort. However, for the purposes of argument, the contexts of some cases can be adapted to help suggest where this justification may arise.

a) Discharging legal, social, or moral duties

It is apparent that a legal duty is ‘a duty for this purpose’.⁴⁴⁴ It would be self-contradictory to treat conduct in compliance with the law as gratuitous or unjustifiable. Some professionals or officials are obliged to communicate injurious news, although they *know with substantial certainty* that their words are going to inflict severe emotional distress upon the recipients. In other words, these professionals or officials can strictly speaking be taken as intentionally⁴⁴⁵ inflicting mental harm whilst performing their legal duties, but it seems warranted that their infliction of mental harm should be regarded as justified. In *Wilkinson v Downton*, an example was suggested where the defendant lied to a person in a position of extreme physical infirmity that ‘his physician has said that he has but a day to live’.⁴⁴⁶ Wright J was of the opinion that this wrongdoer could be criminally and tortiously liable.⁴⁴⁷ Suppose that this notification is not a lie, and the physician has himself or herself conveyed this information to the patient, knowing with substantial certainty that severe emotional

⁴⁴³ Clerk and Dugdale (n 41) para 22-209. Mullis, Parkes and Gatley (n 260) para 17.9.

⁴⁴⁴ Mullis, Parkes and Gatley (n 260) para 14.13.

⁴⁴⁵ Their intention is an intention based upon knowledge (foresight with substantial certainty). Relevant analyses see Chapter 3, section 3.4.

⁴⁴⁶ *Wilkinson v Downton* (n 4) at 60-61 per Wright J.

⁴⁴⁷ *ibid* at 61 per Wright J.

distress will be caused. Since the physician is discharging his or her legal duty (without any purpose to injure), this injurious conduct should be regarded as *justifiable* and thus would not meet the conduct element of this tort. It should be stressed here that the ground on which the physician's conduct can be justified is *the discharge of legal duty* rather than *the communication of the truth*. Communication of the truth may not necessarily justify the physician's conduct,⁴⁴⁸ but in any event it is likely to be regarded as less grave than communication of a lie.⁴⁴⁹ In other words, in this hypothetical situation, the physician's words would not meet the conduct element of this tort because 1) they are justifiable in pursuance of the physician's legal duty; or 2) speaking the truth may not be egregious/serious enough.

For a further example we can adapt the facts of *Boswell v Minister of Police*, where the defendant, as a member of the police force, falsely informed the plaintiff that he had shot dead her nephew and asked the plaintiff to 'go to the police station to identify the body'.⁴⁵⁰ Assuming that the nephew had indeed been shot dead by the defendant, on lawful grounds, and the defendant was telling the truth, it is nevertheless very likely that the plaintiff would suffer the same mental harm. Yet in this hypothetical situation, since the defendant would have been performing his legal duty to notify the plaintiff (without any purpose to injure her), his conduct would be taken as *justifiable* even he knew with substantial certainty that it would bring about severe emotional distress.

Moreover, suppose that the defendant in *Janvier v Sweeney*⁴⁵¹ had not lied to the plaintiff, so that he was indeed a 'detective inspector from Scotland Yard', and he sincerely believed on the basis of his own sources that the plaintiff was 'corresponding with a German spy'. Accordingly he informed her that 'she was the woman they wanted'. Under these circumstances, despite the potential for causing significant emotional distress to the plaintiff, the defendant's deed should *not* be taken as having met the conduct element of this tort. The defendant's conduct can be justified because

⁴⁴⁸ As to whether truth can be adopted as a justificatory ground in relation to this tort, see analyses in section 2.3233.

⁴⁴⁹ Issues regarding gravity and falsity in respect of the first conduct pattern of this tort, see section 2.211.

⁴⁵⁰ *Boswell v Minister of Police* (n 46) at 270-271 per Kannemeyer J.

⁴⁵¹ *Janvier v Sweeney* (n 62).

he did what he did in discharge of his legal duty.⁴⁵²

Besides legal duties, it is also possible that the duty at issue might be a ‘moral or social’ one.⁴⁵³ Assuming that in *Wilkinson v Downton*,⁴⁵⁴ the husband of the plaintiff was indeed ‘smashed up in an accident’ and in desperate need of his family’s help, there would be a significant interest on the plaintiff’s part to be informed of this accident.⁴⁵⁵ In this situation, ‘the interest of the person receiving the communication is of such a character as by its very nature to create a social duty in another under the circumstances to make the communication that he does in fact make’.⁴⁵⁶ Therefore, if the defendant saw what occurred to the plaintiff’s husband and immediately informed the plaintiff, despite knowing for certain that his communication would cause significant emotional distress to her, his conduct could be justified because he was *performing his social duty*.

b) Exercising rights or pursuing interests

In addition to discharging duties, exercising rights or pursuing interests is another important aspect of the qualified privilege (to defamation). In relation to this tort, the commentary to the Restatement (Third) of Torts §46 explicitly recognises that exercising legal rights is a solid ground which may justify the wrongdoer’s intentional infliction of mental harm. The scenario of ‘an employer dismissing an at-will employee’ has been referred to as one of the typical instances where the defendant exercises his or her legal rights whilst inflicting mental harm upon others.⁴⁵⁷ It seems beyond doubt that termination of employment could occasion severe emotional distress to the dismissed employees. Nevertheless, pursuant to the agreed contract or relevant legislation, there exist occasions where the employers or the employees can terminate the employment in a legitimate way. Under these circumstances, the

⁴⁵² Also see analyses in sections 2.3233 and 2.32332.

⁴⁵³ Mullis, Parkes and Gatley (n 260) para 14.13.

⁴⁵⁴ *Wilkinson v Downton* (n 4).

⁴⁵⁵ Discussions regarding ‘interest of person to whom communication addressed’, see Clerk and Dugdale (n 41) paras 22-109 and 22-110.

⁴⁵⁶ *Watt v Longsdon* [1930] 1 KB 130 at 152 per Greer LJ.

⁴⁵⁷ Restatement (Third) of Torts §46 (2012) (n 10) Reporters’ Note on Comment e.

termination of employment *in compliance with the contract or relevant legislation* can be taken as justifiable conduct. However, where ‘an employer who unnecessarily humiliates a fired employee goes further than is necessary to exercise the legal right’,⁴⁵⁸ this justification may be lost. In *Rahemtulla v Vanfed Credit Union*, considered above, the plaintiff was embroiled in an incident of lost money and suspected of theft.⁴⁵⁹ Without conducting any investigation and substantiating their allegations, the senior supervisor of the defendant told the plaintiff that ‘[y]ou don’t have a job anymore’⁴⁶⁰ and dismissed her. The conduct on the part of the employer had been held to be wrongful and unjustified,⁴⁶¹ even reaching the point of being ‘flagrant and outrageous’.⁴⁶² In particular, notwithstanding the defendant’s assertion that it possessed ‘the right to dismiss any employee pursuant to the contract’,⁴⁶³ McLachlin J held that ‘[w]hile the financial institution has the right to dismiss a suspect employee without investigation’, it does not necessarily entail that ‘it be given the right to make reckless and very possibly untruthful accusations as to the employee’s honesty which will foreseeably inflict shock and mental suffering’.⁴⁶⁴ This dictum explicitly indicated that legal rights require to be exercised within reasonable bounds. Exercising rights in an extreme and excessive manner could lead to the loss of its justifiability.

2.3223 Malice and abuse of the privileged occasion

As mentioned above, in the law of defamation where malice on the part of the defendant has been established, qualified privilege is defeated.⁴⁶⁵ If the concepts of discharging duties and exercising rights can be transposed to this tort as justificatory

⁴⁵⁸ *ibid* Comment e.

⁴⁵⁹ *Rahemtulla v Vanfed Credit Union* (n 8) at paras 1 and 3 per McLachlin J.

⁴⁶⁰ *ibid* at para 4 per McLachlin J.

⁴⁶¹ *ibid* at paras 25, 30 and 31 per McLachlin J.

⁴⁶² *ibid* at para 55 per McLachlin J.

⁴⁶³ ‘Rather, the defendant submitted that it dismissed her as it had the right to dismiss any employee pursuant to the contract, giving her two weeks’ pay in lieu of the notice which would otherwise have been required.’ See *ibid* at para 9 per McLachlin J.

⁴⁶⁴ *ibid* at para 55 per McLachlin J.

⁴⁶⁵ Mullis, Parkes and Gatley (n 260) para 14.1; Clerk and Dugdale (n 41) para 22-96; Reid (n 439) 441 at 443-444.

grounds, what role would ‘malice’ play here? In particular, since this tort necessarily involves intentional conduct, would intention as established here equate with malice, and thus preclude justification in this context?

2.32231 Malice in relation to defamation

Traditionally in the law of defamation the issue of malice affects the burden of proof. Leaving aside the 2013 Act, qualified privilege in the common law was taken as a defence that ‘rebutts the inference [of malice] prima facie arising from a statement prejudicial to the character of the plaintiff’,⁴⁶⁶ and ‘throws on the plaintiff the burden of proving express malice’,⁴⁶⁷ and so privilege was lost where the plaintiff managed to establish the presence of malice. Such a framework does not readily map on to this tort, because the burden of proving the element of intention in relation to this tort is always placed on the plaintiff, which would not change even on privileged occasions.

However, malice may have a different role to play here. A privileged occasion, e.g. where the defendant has been performing a duty or exercising rights, can be seen as a ‘just cause or excuse’,⁴⁶⁸ where ‘the law accords immunity from suit’ on the basis of balancing competing interests.⁴⁶⁹ In other words, qualified privilege exists because there are occasions where protection should be granted to an otherwise defamatory communication, in order to facilitate free and frank communication⁴⁷⁰ or the ‘common convenience and welfare of society’.⁴⁷¹ On these occasions, the protection of the individual right to reputation is regarded as outweighed by the ‘common convenience and welfare of society’. However, according to Lord Diplock, this

⁴⁶⁶ *Wright v Woodgate* (1835) 2 C M & R 573 at 577 per Parke B.

⁴⁶⁷ *Smith v Streatfeild* [1913] 3 KB 764 at 770 per Bankes J.

⁴⁶⁸ Mullis, Parkes and Gatley (n 260) para 17.2.

⁴⁶⁹ ‘The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so.’ See *Horrocks v Lowe* [1975] AC 135 at 149 per Lord Diplock.

⁴⁷⁰ *ibid.*

⁴⁷¹ *Toogood v Spyring* (n 438) at 193 per Parke B.

privilege or justification would be lost where ‘the occasion which gives rise to it is misused’ – namely, the defendant ‘uses the occasion for some other reason’.⁴⁷² Where the occasion was *abused*, the purpose of furthering ‘common convenience and welfare of society’ would not be achieved, and protection should no longer be given under these circumstances. Whether or not the defendant ‘uses the occasion for some other reason’ needs to be clarified, and to this end the defendant’s *motive* ‘becomes crucial’.⁴⁷³ Lord Diplock’s dicta perfectly explain why malice defeats qualified privilege. As malice is construed as a ‘dominant and improper motive’ or ‘a desire to injure the person’,⁴⁷⁴ its presence explicitly signifies misuse of the privileged occasion, which directly *defeats the purpose of according protection on these occasions*, and the justificatory effect brought by the privileged occasions is nullified.

2.32232 The abuse of privileged occasions in relation to this tort

In the light of analysis above, the notions of malice, misuse of the occasion, malice defeating privilege or justification are also relevant to this tort. Where the concepts of discharging duties or exercising rights are transposed as justificatory grounds for this tort, *abuse* could nullify their justificatory effect. Where the wrongdoer misuses the occasions of discharging duties or exercising rights, there is no reason to justify conduct which has intentionally occasioned mental harm.

The most straightforward misuse is where the defendant ‘uses the occasion for some other reason’.⁴⁷⁵ This might occur where the wrongdoer has an ‘intention based upon purpose’. As will be discussed in Chapter 3, the mental element of this tort requires intention, which can be further divided into ‘intention based upon purpose (ends or

⁴⁷² *Horrocks v Lowe* (n 469) at 149 per Lord Diplock.

⁴⁷³ *ibid.*

⁴⁷⁴ *ibid.* Though the notion of malice can also be interpreted as including ‘disbelief in the truth (of the impugned publication)’ or ‘absence of honest belief’, the favoured view is that these should merely be taken as conclusive indicators or evidence of malice. See Reid (n 439) at 444-445; Mullis, Parkes and Gatley (n 260) para 17.4; Clerk and Dugdale (n 41) para 22-207. This view appears to be more consistent with the dicta of Lord Diplock in *Horrocks*, see 149-150 per Lord Diplock.

⁴⁷⁵ *Horrocks v Lowe* (n 469) at 149 per Lord Diplock.

means)’⁴⁷⁶ and ‘intention based upon knowledge (foresight with substantial certainty)’.⁴⁷⁷ The mental state of intention based upon purpose (ends or means) denotes that the wrongdoer deliberately engages in the conduct (and uses the occasion) *on purpose* to inflict severe emotional distress, or through the infliction of severe emotional distress to achieve another (ultimate) purpose.⁴⁷⁸ In other words, where a wrongdoer commits this tort (and uses the occasion) with an intention based upon purpose (ends or means), his/her *dominant purpose* is *not* to perform duties or to exercise rights. Therefore, the wrongdoer can be taken as abusing the occasion. In contrast, where the wrongdoer only possesses an intention based upon knowledge (foresight with substantial certainty), ‘knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests’.⁴⁷⁹ In these circumstances, the wrongdoer does not act on purpose to cause severe emotional distress to others, but *knows with substantial certainty* that severe emotional distress would be inflicted by his/her discharge of duties or exercise of rights. Unless the wrongdoer harbours another improper purpose – e.g. to obtain illegitimate advantages, he or she would *not* be taken as misusing the occasion.

In sum, although intention is an essential element of this tort, the presence of the requisite level of intention does not necessarily entail the presence of malice. There are occasions where intentional infliction of mental harm can be justified on the basis of the perpetrator discharging duties or exercising legitimate rights.

⁴⁷⁶ See Chapter 3, section 3.3.

⁴⁷⁷ See Chapter 3, section 3.4.

⁴⁷⁸ Discussions and instances regarding intention based upon ends or means, see Chapter 3, section 3.321.

⁴⁷⁹ See *Horrocks v Lowe* (n 469) at 149 per Lord Diplock.

2.323 Freedom of expression and truth

2.3231 Freedom of expression as a justification

Freedom of expression (or speech) was recognised by the Supreme Court in *Rhodes* as a justification which could defeat the conduct element of this tort.⁴⁸⁰ It was predicated upon the ‘legitimate interest of the defendant in telling his story to the world at large in the way in which he wishes to tell it’ and the ‘corresponding interest of the public in hearing his story’.⁴⁸¹ Despite having identified a ‘corresponding public interest’ in the context of this case, the Supreme Court emphasised that ‘general interest’ is not a necessary condition for the disputed conduct (publication) to be justified,⁴⁸² as freedom of expression does not merely protect speech in relation to public interest but also prevents ‘ordinary discourse’ from being hindered.⁴⁸³

Likewise, in the United States, in accordance with the commentary to the Restatement (Third) of Torts §46, if the disputed conduct inflicting severe emotional distress is ‘communicative’ and ‘protected by the First Amendment’ it is likely that liability will not be imposed.⁴⁸⁴ In *Snyder v Phelps*,⁴⁸⁵ a US Supreme Court decision of significance to this tort, the majority held that ‘[t]he Free Speech Clause of the First Amendment’ could be taken as a defence in tort litigation for ‘intentional infliction of emotional distress’.⁴⁸⁶ The respondents were members of the ‘Westboro Baptist Church’ who often, through picketing at ‘military funerals’, conveyed their world view that ‘God hates and punishes the United States for its tolerance of homosexuality, particularly in America’s military’.⁴⁸⁷ In this case, they announced that they would picket at the funeral of Matthew Snyder, who was a Marine Lance Corporal killed on

⁴⁸⁰ *Rhodes v OPO* (n 1) at paras 74 to 76 per Lady Hale and Lord Toulson; at paras 104 and 110 per Lord Neuberger.

⁴⁸¹ *ibid* at para 75 per Lady Hale and Lord Toulson.

⁴⁸² *ibid* at para 76 per Lady Hale and Lord Toulson.

⁴⁸³ *ibid* at paras 104 and 110 per Lord Neuberger.

⁴⁸⁴ Restatement (Third) of Torts §46 (2012) (n 10) Comment f.

⁴⁸⁵ *Snyder v Phelps* 562 US 443 (2011).

⁴⁸⁶ *ibid* at 451 per Roberts CJ.

⁴⁸⁷ *ibid* at 448 per Roberts CJ.

active service in Iraq. The picketers expressed their views by holding up signs⁴⁸⁸ in a peaceful manner, in compliance with the instructions of police.⁴⁸⁹ It was not disputed that the picketing at issue caused severe emotional distress to the family of the deceased, but whether ‘the church’s speech was insulated from liability by the First Amendment’ was more contentious.⁴⁹⁰ According to the majority view, the protection accorded by the First Amendment to a large extent depended upon ‘whether that speech is of public or private concern’.⁴⁹¹ Due to the unequal importance attached to different kinds of speech, as well as the need to advance open and robust public debates, *speech in relation to public issues* required the *highest* level of protection accorded by the First Amendment.⁴⁹² When determining the public or private nature of the disputed speech, ‘content’, ‘form’, and ‘context’ were crucial factors to be contemplated.⁴⁹³ Taking all circumstances into account, the majority held that the picketing at issue should be ‘entitled to “special protection” under the First Amendment’.⁴⁹⁴ Though what was expressed in the picketing could be found as insulting, even outrageous, liability in relation to this tort was to be ‘set aside’.⁴⁹⁵ In contrast, Justice Alito dissented from the majority view. In his opinion, the picketing in question was an attack upon ‘private figures’, *unrelated to* a ‘matter of public concern’,⁴⁹⁶ or at least *not entirely related to* public concern.⁴⁹⁷ In other words, the conduct on the part of the respondents – ‘launching vicious verbal attacks’ on private persons – was of ‘slight social value’ and made ‘no contribution to public debate’.⁴⁹⁸ His view was therefore that this intentional infliction of emotional distress was not justified in virtue of the First Amendment.⁴⁹⁹

⁴⁸⁸ The demonstration signs read as ‘God Hates the USA/Thank God for 9/11’, ‘America is Doomed’, ‘Don’t Pray for the USA’, ‘Thank God for IEDs’, ‘Thank God for Dead Soldiers’, ‘Pope in Hell’, ‘Priests Rape Boys’, ‘God Hates Fags’, ‘You’re Going to Hell’, ‘God Hates You’. See *ibid*.

⁴⁸⁹ *ibid*.

⁴⁹⁰ *ibid* at 450 per Roberts CJ.

⁴⁹¹ *ibid* at 451 per Roberts CJ.

⁴⁹² *ibid* at 452 per Roberts CJ.

⁴⁹³ *ibid* at 453-454 per Roberts CJ.

⁴⁹⁴ *ibid* at 458 per Roberts CJ.

⁴⁹⁵ *ibid* at 458-459 per Roberts CJ.

⁴⁹⁶ *ibid* at 470 per Alito J.

⁴⁹⁷ According to Alito J, in regard to the demonstration at issue, there was ‘actionable speech’ interspersed with ‘speech that is protected’. See *ibid* at 471 per Alito J.

⁴⁹⁸ *ibid* at 464-465 per Alito J.

⁴⁹⁹ ‘I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private

Clearly if a case similar to *Snyder* were to be decided by the UK Supreme Court, the outcome might well differ. While in the US *speech as regards matters of public concern* enjoys the *highest* level of constitutional protection,⁵⁰⁰ in England and in Scotland freedom of expression must be balanced against the protected rights of others (notably, reputation, reasonable expectation of privacy, or mental integrity). Nevertheless, the reasoning in *Snyder* is illuminating in the sense that it offers more extended discussion than provided in *Rhodes* in regard to the potential for asserting freedom of expression as a justification for this tort.

2.3232 Considerations relevant to asserting freedom of expression as a justification

a) Balancing competing interests

The decision in *Rhodes v OPO* makes plain that in certain circumstances, freedom of expression (speech) can be upheld as a justification for the purposes of this tort. Yet under *what* circumstances is the next question. In England and in Scotland, the most important consideration is arguably *the balancing of competing interests*, as already implied in *Rhodes*. Whilst concluding that ‘there is every justification for the publication’, the majority of the Supreme Court were in fact *weighing* the appellant’s right to express himself and the ‘public interest in others being able to listen to his life story’⁵⁰¹ *against* the ‘right to personal safety’,⁵⁰² or the vulnerable child’s right to mental integrity. In other words, the competing interests here were freedom of expression (in conjunction with the recipients’ interests to receive information) against the right to mental integrity (or right to personal safety). And the core question after balancing the competing interests is whether the right to freedom of expression *outweighs* the right to mental integrity. If the answer is *yes*, freedom of expression operates as a justification and defeats the conduct element of this tort. If *no*, tortious

concern.’ See *ibid* at 473 per Alito J.

⁵⁰⁰ *ibid* at 452 per Roberts CJ.

⁵⁰¹ *Rhodes v OPO* (n 1) at para 76 per Lady Hale and Lord Toulson.

⁵⁰² *ibid* at para 73 per Lady Hale and Lord Toulson.

liability may attach to the conduct intentionally inflicting mental harm.

Existing case law in respect of misuse of private information would suggest that when balancing countervailing interests of this kind four points are of considerable significance: 1) ‘neither’ the right to freedom of expression nor the right to respect for private life ‘has *as such* precedence over the other’; 2) the focus should be upon the ‘comparative importance of the specific rights being claimed in the individual case’; 3) the ‘justifications for interfering with or restricting each right’ should be considered; and 4) the balancing must be conducted in accordance with a ‘proportionality test’.⁵⁰³ In this context relevant factors such as ‘contribution to a debate of general interest’, and the ‘content, form and consequences’ of the disputed conduct and so on⁵⁰⁴ should also be taken into account.

b) Mental integrity and freedom of expression as countervailing interests

Since the balancing exercise is predicated upon an observation of the ‘comparative importance of the specific rights being claimed’,⁵⁰⁵ further discussion of mental integrity and freedom of expression may be required here. As distinct from the ‘right to respect for private and family life’⁵⁰⁶ and ‘freedom of expression’,⁵⁰⁷ (the right to) mental integrity is not a Convention right. Nor is it a traditional right of the person, such as the right to reputation or the right to physical integrity. This characteristic might imply that mental integrity does not enjoy the same importance and protection as the right to freedom of expression or the right to privacy. However, it has been well recognised in other jurisdictions that protection can be granted to mental integrity,

⁵⁰³ These four propositions can be taken as derived from the ruling of *Campbell v MGN Ltd* (n 336). In *In re S (FC)*, Lord Steyn observed them as constituting the ‘ultimate balancing test’, see *In re S (FC)* [2004] UKHL 47; [2005] 1 AC 593 at para 17 per Lord Steyn. In *Richard v BBC*, these points have also been accepted as crucial principles to be followed when exercising the balance. See *Richard v BBC* (n 346) at para 270 per Mr Justice Mann.

⁵⁰⁴ See *Richard v BBC* (n 346) at para 276 per Mr Justice Mann.

⁵⁰⁵ *In re S (FC)* (n 503) at para 17 per Lord Steyn; *Richard v BBC* (n 346) at para 270 per Mr Justice Mann.

⁵⁰⁶ See European Convention on Human Rights Article 8.

⁵⁰⁷ See European Convention on Human Rights Article 10.

mental health, or even emotional tranquility, provided some limiting conditions are met.⁵⁰⁸ In other words, in certain circumstances,⁵⁰⁹ mental integrity is undoubtedly an interest worthy of protection, and can be weighed against freedom of expression, or at least against freedom of expression in an area not of public concern.⁵¹⁰

As context is crucial when weighing mental integrity against freedom of expression, factors such as the gravity of the disputed conduct (the content, the form, and the context of the speech; the mental state or the knowledge of the actor; whether there exists any aggravating factor), the extent of the effect produced by the speech upon the victim, the potential contribution of the publication to public/general interest, and the attributes of the victim⁵¹¹ should all be placed into consideration. For instance, when the gravity of the disputed conduct is weighed up a stronger justification would be required for more egregious conduct. In comparison with the disputed conduct in *Rhodes v OPO* (the defendant publishing his own life story), picketing at a funeral and insulting the dead (as in *Snyder*) is clearly more egregious. Thus the justificatory ground – e.g. the purpose of the impugned speech and the interests to be protected by it – for the conduct committed in the latter must be relatively more cogent. Likewise, a stronger justification would be needed to justify the deeds committed in *Wilkinson* and *Janvier*, which on the face of it are more reprehensible than the conduct in *Rhodes*.⁵¹²

⁵⁰⁸ The conditions for granting protection to mental integrity injured by intentional conduct would differ from those for mental integrity injured as a result of one's negligence. For instance, in relation to intentional interference, *Rhodes* requires the satisfaction of three elements before protection can be given to mental integrity/health, whilst different requirements need to be met in cases where mental integrity is damaged by virtue of one's negligence. Parallel conditions in relation to intentional interference with mental integrity required in other jurisdictions (as in Canada and Australia) can be observed in the foregoing case review in this chapter.

⁵⁰⁹ Namely, where the prerequisites of this tort or those of the tort of negligently caused psychiatric illness have been met.

⁵¹⁰ This differentiation will be discussed as follows.

⁵¹¹ For instance, whether the victim is a public or private figure, or whether the victim is particularly susceptible to mental harm.

⁵¹² Arguably, as analysed above, the disputed conduct in *Rhodes* is not serious enough to meet the requirement of gravity of this tort. If that is the case, no justification is needed. Thus there is no need to conduct the exercise of balancing. Parallel to the contexts of *Rhodes*, if a journalist published an article, knowing with substantial certainty that its publication would bring about mental harm to certain people involved, but did everything *in a responsible way* and *reasonably believed* that the publication is *in public interests*, his or her conduct should not be taken as egregious so as to constitute the required gravity (of the conduct) of this tort. Notably, it should be reiterated that in *Rhodes* the Supreme Court did not separate the notion of 'gravity of the conduct' from that of 'without

The relative importance accorded to a potential contribution to a debate of public interest deserves more exploration. In this regard, different approaches have been employed on different sides of the Atlantic. The US Supreme Court in *Snyder v Phelps* distinguished speech of private concern from speech of public concern,⁵¹³ considering the latter as entitled to the *highest* level of protection granted by the First Amendment.⁵¹⁴ It is implied that speech without social value and unable to enhance public debates is much less likely to be adopted as justification for intentional infliction of emotional harm. In contrast, the UK Supreme Court in *Rhodes* did *not* address the issue as to whether expression *in relation to* public interest and that *unrelated to* public concern should be treated differently. According to the Supreme Court, public or general interest was not a necessary requirement in justifying the impugned conduct.⁵¹⁵ Apart from advancing open and robust public debate, the function of freedom of expression can also include ‘the need to avoid constraining ordinary (even much offensive) discourse’.⁵¹⁶ Based upon this view, even ordinary discourse irrelevant to any public concern can be taken as speech entitled to freedom of expression and placed into the balance. Nevertheless, the Supreme Court did not equate the importance of ordinary discourse with that of speech in relation to matters of public concern. It appears more warranted that *less* value and importance should be attached to ordinary discourse *than* to speech of public concern. In other words, the latter should be taken as *stronger* justification, enjoying higher protection. In contrast, where the disputed speech is regarded as of low public value and importance – namely, a *weak* justification, more weight should be given to the protection of mental integrity in the balancing exercise. In brief, although in formal terms different approaches seem to have been employed as between the US and the UK Supreme Courts, it is arguable that these two regimes are not so different in practical terms.

justification’.

⁵¹³ *Snyder v Phelps* (n 485) at 451 per Roberts CJ.

⁵¹⁴ *ibid* at 452 per Roberts CJ.

⁵¹⁵ *Rhodes v OPO* (n 1) at para 76 per Lady Hale and Lord Toulson.

⁵¹⁶ *ibid* at para 104 per Lord Neuberger.

2.3233 Truth as a justification

2.32331 General discussion

Truth is also a factor that requires further analysis. In accepting freedom of expression as a justification for this tort, the majority in the Supreme Court in *Rhodes* mentioned that '[f]reedom to report the truth is a basic right to which the law gives a very high level of protection', and that '[t]he right to report the truth is justification in itself'.⁵¹⁷ Do these statements signify that truth can be taken as a justification in this tort? This question had been raised by Fleming long before the decision in *Rhodes*,⁵¹⁸ although no clear answer emerged. Arguably, truth can be a factor to be considered when balancing countervailing interests, as it could affect the gravity of conduct, but it may not constitute a solid justification for this tort. This proposition is confirmed when one reflects upon the protected interests and conduct patterns of this tort.

First of all, *truth* is a complete defence in the law of defamation,⁵¹⁹ because the principal interest protected by defamation is *reputation*. If the defamatory imputation is (substantially) true, it is shown that 'a claimant is not entitled to the unblemished reputation which he/she claims to have been damaged by the publication'.⁵²⁰ In contrast, this tort primarily protects against stand-alone harm to one's mental integrity (or one's right to personal safety). The protected interests of this tort can be harmed regardless of the truth or falsity of the disputed statement. There seems to be no solid ground why mental integrity should lose all protection where the wrongdoer is telling the truth.

This point becomes more apparent when one looks at some hypothetical examples (as

⁵¹⁷ *ibid* at para 77 per Lady Hale and Lord Toulson.

⁵¹⁸ 'It is an open question whether truth would constitute a defence to, for example, a rude communication of a near-one's death which is intended to hurt the plaintiff'. See J Fleming, *Fleming's The Law of Torts* (C Sappideen and P Vines eds, 10th edn, 2011) 43.

⁵¹⁹ *Parkes* (n 294) at paras 8.11 and 8.28; *Reid* (n 132) para 11.02; *Gordley* (n 322) 245. Also see Defamation Act 2013 s 2(1), 'It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true'.

⁵²⁰ *Chase v Newsgroup Newspapers Ltd* [2002] EWCA Civ 1772 at para 33 per Lord Justice Brooke. Also see *Mullis, Parkes and Gatley* (n 260) para 11.1.

raised in the following section). Lord Neuberger observed that ‘it will be a very rare case where a statement which is not untrue could give rise to a claim, save, perhaps where the statement was a threat or (possibly) an insult’.⁵²¹ This implies that *truth does not generally function as justification* for conduct patterns constituted by *threatening* or *insulting*. Arguably, even for the first conduct pattern, in exceptional cases where false statements have not been adopted as the means to inflict mental harm, truth may not justify the disputed conduct under certain circumstances. Some hypothetical examples of different conduct patterns will be examined as follows.

2.32332 Examples

In relation to the first conduct pattern, hypothetical examples may be considered, based loosely on the facts of *Wilkinson v Downton*⁵²² and *Boswell v Minister of Police*.⁵²³ Let us suppose: 1) the defendant did in fact witness the husband of the plaintiff being ‘smashed up in an accident’ and told the injured person’s family about what occurred; or 2) the defendant police factually did indeed shoot the plaintiff’s nephew, on lawful grounds, and informed his family of the incident. In these two examples, without doubt significant emotional distress would have been occasioned to the plaintiffs. Whether or not the defendants’ communication of truth could justify their infliction of mental harm depends upon what individual/societal advantages can be promoted by their truth-telling, and whether these outweigh the protection of individual mental integrity. In essence this analysis is very similar to that in relation to the justification of *discharging duties or exercising rights*, as investigated in sections 2.3221 and 2.3222. However, it should be acknowledged that, compared with informing others of a false story, communicating the truth is certainly to be viewed as less grave. Indeed it is highly unlikely that the communication of the truth would meet the requirement of gravity for this tort. In this situation, arguably no question of justification would arise. Only under exceptional circumstances could communicating the truth be taken as

⁵²¹ *Rhodes v OPO* (n 1) at para 107 per Lord Neuberger.

⁵²² *Wilkinson v Downton* (n 4).

⁵²³ *Boswell v Minister of Police* (n 46).

sufficiently egregious. For instance, the defendants in the above examples might deliberately depict every searing detail of the accident or the death of the plaintiffs' relative, *on purpose* to cause severe emotional distress to the plaintiffs. It should be stressed here that not every insensitive or rude communication of bad news should be taken as egregious. In this instance, it is the presence of an unlawful motive or purpose that heightens the gravity of the defendants' conduct.⁵²⁴ And, since the defendants' very purpose is to make use of the truth to inflict mental harm, it appears unwarranted that the truth of the communication can be regarded as a justification here.

In relation to the second conduct pattern, the use of threatening behaviour that significantly invades the victims' mental integrity, truth may not serve as an adequate justification. Threats need not be based on falsehood and indeed threats based upon true facts can be even more powerful and frightening. Whether or not a truth-based threat that inflicts mental harm can be justified should be decided in the context of the case, which encompasses the wrongdoer's motive or purpose. For instance, suppose everything uttered by the defendant in *Janvier v Sweeney*⁵²⁵ had been true. He was actually a 'detective inspector from Scotland Yard' when he threatened the plaintiff that 'she was the woman they wanted' and asked for her cooperation. His threat and infliction of mental harm might be justified provided that he was acting in furtherance of his legal duties. However, it is also possible that, on the basis of *true* information, the defendant might threaten the plaintiff to achieve a goal *irrelevant to his legal duty*, inflicting severe emotional distress upon the plaintiff. In this kind of situation, without doubt the threat cannot be justified on the ground of discharging duties. Nor can (communicating the) truth serve as a justification in this instance, as true information is used as an essential basis of the defendant's wrongdoing (threatening).

In relation to the third conduct pattern, insults or other abusive conduct, as argued in section 2.23523, the *truth* or *falsity* of the disputed statement is not an absolute concern to the conduct pattern of *insults*. The focus of insult rests upon its potential to harm

⁵²⁴ Concerning cases where unlawful motive/purpose can be observed, and the boundary between motive and (intention based upon) purpose, see Chapter 3, section 3.323.

⁵²⁵ *Janvier v Sweeney* (n 62).

one's dignity or mental integrity, and the utterance of abusive, injurious, *but true* statements can by all means achieve that goal. If a wrongdoer has made use of the truth to humiliate others and to inflict mental harm, there is no reason why truth should be invoked as a justification for the wrongdoing.

2.32333 Truth as a factor in the balance

It follows from the above that in many situations truth may not function as an adequate justification for this tort. However, as the truth or otherwise of the defendants' words can be relevant to the gravity of conduct as well as to their potential contribution to discourse on a matter of public interest, it should certainly be placed into balance when weighing freedom of speech against mental integrity. Several scenarios can be further differentiated here. In ordinary situations, where an actor communicates the truth, what he/she says is objectively true, and he/she subjectively believes that the uttered statement is true. Under this circumstance, the objective truthfulness is a factor relevant to determining what public or private interests can be furthered by this statement. The subjective belief (in truth) on the part of the actor signifies that his/her conduct is less grave.⁵²⁶ In contrast, in ordinary situations, where an actor communicates an objectively false statement, which he/she subjectively believes to be false, it is unlikely that any public interest can be furthered by it. Dissemination of false statements can hardly advance public debates or even ordinary discourse.⁵²⁷ The actor's subjective belief in the statement's falsity signifies that the conduct is more grave.⁵²⁸

Under exceptional circumstances, the actor may perhaps believe a statement to be false where it is *objectively true*. In such a case the actor's mental state and conduct indicate

⁵²⁶ It is the case only when the actor does *not* harbour any unlawful motive/purpose.

⁵²⁷ Yet, arguably, giving some latitude, in particular to journalists, for the dissemination of information which may be false could potentially further freedom of expression by reducing the chilling effect. When striking a balance between freedom of expression and reasonable expectation of privacy (or other protected interests), the 'severity of the sanction imposed' or 'whether any sanction would have a chilling effect' should be a relevant factor to be considered. See *Richard v BBC* (n 346) at paras 230, 276, 303 and 304 per Mr Justice Mann.

⁵²⁸ This point is particularly relevant to the first conduct pattern of this tort.

an *abuse* of freedom of expression, which should be placed into the balance. In contrast, where the uttered statement is *objectively false*, the actor may *subjectively* believe it to be true. It should be noted here that the actor's belief in the truth of his/her statement *does not preclude* the formation of the necessary level of intention for this tort. Subjective belief in the truth of the statement at issue is not inconsistent with either *knowing with substantial certainty* that this statement would inflict severe emotional distress upon others, or *on purpose* using this statement to cause severe emotional distress.⁵²⁹ However, as long as the intention of the actor is *not* in the form of *purpose* to use the statement to cause severe emotional distress, his/her subjective belief in the truth of statement can arguably *lower the gravity* of conduct. The reduction in the gravity of conduct should be placed into consideration when the various factors are balanced together.

2.33 Conclusion on justification

In *Rhodes v OPO*, the conduct element of this tort was stated to be 'words or conduct directed at the claimant' for which 'there is no justification or excuse'. This raised the question whether claimants may raise certain justifications or excuses as a *defence*? Or does the Supreme Court intend *the absence of justification or excuse* to be an integral part of the conduct element? In this connection it is significant that the Supreme Court placed the onus of proof on the claimant in regard to the matter of absence of justification or excuse. It therefore appears probable that *the absence of justification or excuse* was regarded by the Supreme Court as an integral part of the conduct element. This means that a justification/justificatory ground cannot be adopted as a defence, but instead their existence goes to the conduct element and can negate liability. The potential justificatory grounds which could be used in this tort to defeat the conduct element may include: consent, discharging duties or exercising rights, and freedom of expression.

With regard to consent, it appears unlikely that the wrongdoer can acquire consent

⁵²⁹ Regarding different types/levels of intention, see Chapter 3, sections 3.3 and 3.4.

from the victim as to the first conduct pattern, since the victim has to be tricked and believe in the false story to be emotionally injured. Similarly with the second conduct pattern, it seems unreasonable that the victim can knowingly and voluntarily give his/her consent to being threatened, and nevertheless feel intimidated and distressed by the threat. It is more probable that consent could be given or obtained in respect of the third conduct pattern; despite the victim having given his/her consent to being insulted, severe emotional distress may still be caused during the process of insulting or abusive conduct.

By reference to the commentary on the Restatement (Third) of Torts §46 as well as to the law of defamation, it is conceivable that the concepts of discharging duties and exercising rights could form the basis for justification in this tort. Mental harm may be intentionally inflicted while the perpetrator is performing their duties or exercising legitimate rights. If we regard the ‘common convenience and welfare of society’ as more important interests to be protected than the mental integrity of the victim, then the discharge of duties or the exercise of rights should be prioritised as a justification which defeats the conduct element of this tort. However, where the wrongdoer misuses such an occasion, there is no reason to sacrifice the protection of the victim’s mental integrity. For instance, where a wrongdoer uses the occasion with intention based upon purpose (ends or means) to inflict mental harm, he/she should be taken as misusing the occasion since his/her *dominant purpose* is *not* to perform duties or to exercise rights. In contrast, where the wrongdoer possesses only intention based upon knowledge (foresight with substantial certainty) without any improper purpose, he/she should *not* be taken as misusing the occasion. In brief, although intention is an essential element of this tort, intentional infliction of harm does not necessarily entail the presence of malice or misuse of the occasion. There are instances where the conduct of an intentional actor in inflicting mental harm may be justified on the basis of his/her discharge of duties or exercise of legitimate rights.

Freedom of expression can be adopted as a justification for conduct of this tort in the light of the reasoning in *Rhodes v OPO* as well as the commentary to the Restatement (Third) of Torts §46. In this connection, the *balancing of countervailing interests* is

the most important consideration. Freedom of expression (and the recipients' interests to receive information) would be weighed against the victim's right to mental integrity (or right to personal safety). Where freedom of expression *outweighs* the right to mental integrity, the former can be adopted as justification and defeat the conduct element of this tort. When striking this balance, factors such as the gravity of the disputed conduct (the content, the form, and the context of the speech; the mental state or the knowledge of the actor; whether there exists any aggravating factor), the attributes of the victim, the extent of effect produced upon the victim, and the potential contribution to public interest should all be taken into account. As far as the gravity of conduct is concerned, a stronger justification would be required for more egregious conduct. As regards the contribution to public interest, *less* value and importance should be attached to ordinary discourse *than* to speech on matters of public concern. In other words, speech on matters of public concern constitutes *stronger* justification.

Closer analysis of the protected interests of this tort and its different conduct patterns (in 2.32332) indicates that truth does not function as an infallible justification. However, when weighing freedom of expression against mental integrity, the truth of the defendant's words can certainly be placed in the balance, since it relates to the gravity of conduct as well as to the possible contribution to discourse on a matter of public interest. The objective truthfulness of the statement is a factor relevant to determining what public or private interests can be served by the defendant's words. His or her subjective belief in their truth arguably signifies that the conduct is less grave, provided that the actor does *not* harbour a *purpose* (intention based upon *purpose*) to use the statement to cause severe emotional distress.

As a final reflection in this chapter, however, it is arguable that the approach of the Supreme Court is not entirely satisfactory in treating absence of justification or excuse as a part of the conduct element of this tort. An alternative approach would be to remove the controversial formulation of absence of justification or excuse, and to rephrase the conduct element in a way that more clearly reflects the gravity of conduct and fairly distributes the burden of proof. The *gravity of conduct* and *justification for the conduct* are conceptually different, and it would therefore make sense to

reformulate the elements of this tort so that the conduct element and the issue of available defences were taken separately. This would then mean that the more egregious the disputed conduct, the stronger the defence (justification) it would require, and it would be for the defendant to establish the latter.

Chapter 3 The Concept of Intention

In this chapter, different interpretations of the term ‘calculated’ employed in *Wilkinson v Downton*, as well as the foundations of intention, will be explored respectively under the heads of ‘intention based upon purpose (ends or means)’, ‘intention based upon knowledge (foresight with substantial certainty)’, and ‘recklessness’. This thesis will argue that, in addition to ‘intention based upon purpose (ends or means)’, the mental element of this tort should also include ‘intention based upon knowledge (foresight with substantial certainty)’, whilst ‘recklessness’ should be excluded. Inferred or constructive foresight/intention should be accepted for these purposes, along with actual or subjective foresight/intention. Where the object of intention can be perceived as ‘(severe) mental or emotional distress’ or ‘(grave) effects’, the notion of ‘foresight with substantial certainty’ may arguably be regarded as the most suitable interpretation of the equivocal, but key, term, ‘calculated’.

3.1 Introduction

3.11 Historical perspective: Issues of ‘calculation’ and ‘intention’ in the *Wilkinson* authorities

The case of *Wilkinson v Downton*¹ can be seen as providing the foundation of the modern law as regards the tort of intentional infliction of mental harm. In this case, where the defendant played a practical joke and told the plaintiff that ‘her husband was smashed up in an accident’, ‘with both legs broken’, and waiting for her to ‘fetch him home’ immediately,² the defendant was found as having ‘wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal

¹ *Wilkinson v Downton* [1897] 2 QB 57.

² *ibid* at 58 per Wright J.

right to personal safety'.³ Because the conduct on the part of the defendant was 'so plainly calculated to produce some effect of the kind which was produced', Wright J held that 'an intention to produce it ought to be imputed to the defendant'.⁴ Approximately 20 years later, in *Janvier v Sweeney*,⁵ the Court of Appeal approved the reasoning in *Wilkinson v Downton*,⁶ considering *Janvier* as a 'much stronger case' than *Wilkinson*, since in *Janvier* 'there was an intention to terrify the plaintiff for the purpose of attaining an unlawful object'.⁷ These two decisions were construed by Dillon LJ (with whom Rose LJ agreed) in *Khorasandjian v Bush*, as establishing the principle that 'false words or verbal threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing, physical injury to the person to whom they are uttered are actionable'.⁸ Taking *Wilkinson*, *Janvier*, and *Khorasandjian* into consideration, Hale LJ in *Wong v Parkside Health NHS Trust* stated that, for the requirements of this tort to be met, 'it is not necessary to prove that the defendant actually wanted to produce such harm';⁹ the defendant is 'taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour'.¹⁰

In *Wainwright v Home Office*, Lord Hoffmann remarked that, in *Wilkinson v Downton*, Wright J thought that 'the plaintiff should succeed whether the conduct of the defendant was intentional or negligent', yet as Wright J was prevented by *Victorian Railways Commissioners v Coultas*¹¹ from deciding the case on the basis of negligence, he 'devised a concept of imputed intention which sailed as close to negligence as he

³ *ibid* at 58-59 per Wright J.

⁴ *ibid* at 59 per Wright J.

⁵ *Janvier v Sweeney* [1919] 2 KB 316.

⁶ *ibid* at 324 per Bankes LJ.

⁷ *ibid* at 326 per Duke LJ.

⁸ *Khorasandjian v Bush* [1993] QB 727 at 735 per Dillon LJ.

⁹ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721; [2003] 3 All ER 932 at para 10 per Lady Justice Hale.

¹⁰ *ibid* at para 12 per Lady Justice Hale.

¹¹ 'Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper.' See *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222 at 225 per Sir Richard Couch.

felt he could go'.¹² However, there was no longer a need to 'fashion a tort of intention' because the facts of *Wilkinson* could comfortably be accommodated 'in the law of nervous shock caused by negligence' by the time of *Janvier*.¹³ Moreover, although Lord Hoffmann considered *Wilkinson v Downton* as having provided *no* remedy for emotional distress falling short of recognised psychiatric illness,¹⁴ he suggested that, if the principle that 'damages for mere distress are not recoverable' were to be abandoned, then this could only be in circumstances where the defendant had actually 'acted in a way which he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not'; 'imputed intention will not do'.¹⁵

Lord Hoffmann's comments on Wright J's judgment were considered by the Supreme Court in *Rhodes v OPO* to have misinterpreted the decision. The notion of 'imputed intention' was not 'devised by Wright J to get around a perceived stumbling block in the law of negligence'.¹⁶ It was 'in the mainstream of legal thinking at that time', and, in addition, Wright J should have known that *Victorian Railways Commissioners v Coultas* was not binding upon him.¹⁷ Also, it may be incorrect that, by the time of *Janvier*, 'the law would have comfortably accommodated the facts of *Wilkinson v Downton* within the law of nervous shock caused by negligence'.¹⁸ As 'negligence and intent are very different fault elements', they should be differentiated in respect of the 'bases (and possible extent) of liability for causing personal injury'.¹⁹ As regards the concepts of 'calculated to cause harm' and 'intention', the Supreme Court considered it certain that the term 'calculated' was employed by Wright J in the sense of 'likely

¹² *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 at para 44 per Lord Hoffmann.

¹³ *ibid* at para 40 per Lord Hoffmann.

¹⁴ *ibid* at para 47 per Lord Hoffmann.

¹⁵ *ibid* at para 45 per Lord Hoffmann.

¹⁶ *Rhodes v OPO* [2015] UKSC 32; [2016] AC 219 at para 62 per Lady Hale and Lord Toulson.

¹⁷ *ibid*.

¹⁸ From the perspective of the Supreme Court, during this period the decision in *Dulieu v White & Sons* had limited a claim concerning negligently caused nervous shock to cases where 'the nervous shock resulted from fear for the plaintiff's own personal safety'. However, the fear on the part of Mrs Wilkinson was not related to her own safety, but for the personal safety of her husband. See *ibid* at para 63 per Lady Hale and Lord Toulson. Also see *Dulieu v White & Sons* [1901] 2 KB 669 at 675-676 per Kennedy J.

¹⁹ *Rhodes v OPO* (n 16) at para 63 per Lady Hale and Lord Toulson.

to have an effect of the kind which was produced'.²⁰ Accordingly it carved out the fundamental elements of the *Wilkinson* tort, requiring the mental element to be 'an intention to cause at least severe mental or emotional distress',²¹ yet leaving the contents of intention not fully explored.

In sum, this sequence of case law following on from *Wilkinson*, especially the Supreme Court decision in *Rhodes v OPO*, demonstrates that the *Wilkinson* tort is still alive²² and differentiated from the law of negligence. Intention is the required mental element of this tort, which will be the main issue to be explored in this chapter. Before different foundations of intention are examined, several terms employed in the *Wilkinson* authorities, in particular 'calculated', 'intention', and 'actual' or 'imputed' (intention), require clarification.

3.12 What does 'calculated' mean and what constitutes 'intention'?

As noted above, in *Wilkinson v Downton*, since the conduct on the part of the defendant was 'so plainly calculated to produce some effect of the kind which was produced', Wright J held that 'an intention to produce it ought to be imputed to the defendant'.²³ However, the meaning of 'calculated', and what constitutes intention were not elucidated in this case. Nearly 120 years later, in *Rhodes v OPO*, the Supreme Court took it as doubtless that the term 'calculated' was used by Wright J in the sense of 'likely to have an effect of the kind which was produced'.²⁴ Moreover, the majority required the mental element of the *Wilkinson* tort to be 'an intention to cause at least severe mental or emotional distress',²⁵ although they did not fully clarify the contents of intention. Accordingly, the main task of this chapter is to investigate these terms further.

²⁰ *ibid* at para 36 per Lady Hale and Lord Toulson.

²¹ *ibid* at para 88 per Lady Hale and Lord Toulson.

²² Having not been absorbed or accommodated in the law of negligence.

²³ *Wilkinson v Downton* (n 1) at 59 per Wright J.

²⁴ *Rhodes v OPO* (n 16) at para 36 per Lady Hale and Lord Toulson.

²⁵ *ibid* at para 88 per Lady Hale and Lord Toulson.

On the basis of the authorities reviewed here, the term ‘calculated’ can possibly be interpreted as: ‘acting with the desire or purpose (to bring about the complained consequence)’; ‘foreseeing (in an actual or constructive manner) with substantial certainty the consequence to occur’; or ‘foreseeing (in an actual or constructive manner) the likelihood of the consequence to occur’. The Supreme Court’s construction of ‘calculated’ in *Rhodes v OPO* is close to the third interpretation. Whether or not it is the most appropriate interpretation requires further analysis. In section 3.4432 below it is argued that the second interpretation, i.e. ‘foresight with substantial certainty’, is the most suitable interpretation of the equivocal term ‘calculated’.²⁶ These different interpretations will be explored respectively under the heads of ‘intention based upon purpose’, ‘intention based upon knowledge (with substantial certainty)’, and ‘recklessness’. This chapter will then argue for interpretation(s) which can inform the structure of intention (or mental element) of this tort.

3.13 The difference between ‘actual’ and ‘imputed’, ‘inferred’, or ‘constructive’ intention

In *Wilkinson v Downton*, given that ‘the defendant’s act was so plainly calculated to produce some effect of the kind which was produced’, Wright J held that ‘an intention to produce it ought to be imputed to the defendant’.²⁷ In *Wong v Parkside Health NHS Trust*, Hale LJ stated that, for the requirements of this tort to be met, ‘it is not necessary to prove that the defendant actually wanted to produce such harm’,²⁸ the defendant is ‘taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour’.²⁹ On the basis of these dicta, *imputed* intention, as contrasted with *actual* or *subjective* intention on the part of the actor, may be regarded as intention in an *objective* sense, *inferred* or *attributed* on the basis of the objective facts, e.g. the actor’s

²⁶ For further discussion see section 3.4432.

²⁷ *Wilkinson v Downton* (n 1) at 59 per Wright J.

²⁸ *Wong v Parkside Health NHS Trust* (n 9) at para 10 per Lady Justice Hale.

²⁹ *ibid* at para 12 per Lady Justice Hale.

conduct or contextual circumstances, or the knowledge shared by ordinary and reasonable people.

Notably, in *Rhodes v OPO*, the Supreme Court distinguished ‘imputing the existence of an intention as a matter of law’ from ‘inferring the existence of an intention as a matter of fact’.³⁰ The former is seen by the Supreme Court as a ‘vestige of a previous age’, ‘unsound in principle’, and should be abolished.³¹ Nevertheless, the inference of intention or an inferred intention appears to be acceptable. When canvassing the mental element of this tort, the Supreme Court did not clarify whether ‘actual’ or ‘subjective’ intention is an absolute requirement.³² Although the usage of ‘actually intends’ can be discerned,³³ the recognition of inferred intention can also be observed in several paragraphs of the *Rhodes v OPO* judgments.³⁴ From the purposes of this tort, *inferred* or *constructive* intention should be accepted along with *actual* or *subjective* intention. A categorical requirement for *actual* or *subjective* intention seems incompatible with the reasoning of *Wilkinson v Downton*, of which *inferred* intention is an essential part. More importantly, a categorical requirement for *actual* or *subjective* intention would prove impossible in practice. Since it is never possible to see through the mind of another, and direct evidence about the defendant’s intention is almost unlikely to be present, in most cases intention has to be inferred from conduct, relevant contexts, or knowledge shared by ordinary and reasonable people.

³⁰ *Rhodes v OPO* (n 16) at para 81 per Lady Hale and Lord Toulson.

³¹ ‘The doctrine was created by the courts and it is high time now for this court to declare its demise.’ See *ibid*.

³² *ibid* at para 88 per Lady Hale and Lord Toulson. In comparison, as discussed above, although Lord Hoffmann in *Wainwright* did mention that ‘[t]he defendant must actually have acted in a way which he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not’ as well as that ‘imputed intention will not do’, he was not proposing the general requirement of this tort, but specifically addressing the circumstances where the rule that ‘damages for mere distress are not recoverable’ can possibly be abandoned. See *Wainwright v Home Office* (n 12) at para 45 per Lord Hoffmann.

³³ *Rhodes v OPO* (n 16) at para 87 per Lady Hale and Lord Toulson.

³⁴ Following the scenarios raised to elucidate intention, the Supreme Court commented that ‘[t]here would be no difficulty in inferring as a matter of fact that he intended to cause severe distress to the claimant; it was the means of trying to achieve his demand.’ See *ibid* at para 85 per Lady Hale and Lord Toulson; and ‘There are statements (and indeed actions) whose consequences or potential consequences are so obvious that the perpetrator cannot realistically say that those consequences were unintended.’ at para 112 per Lord Neuberger.

3.2 Intention in relation to conduct or consequence

3.21 The distinction

Before exploring intention, it should be borne in mind that the focus will be placed on *intention in relation to consequence*, rather than *intention in relation to conduct*. As regards this distinction, Cane made it clear that the concept of the latter is predicated on ‘the idea of choice’,³⁵ whilst the account of the former is founded on the ideas of ‘aim, purpose, and objective’.³⁶ In other words, *intention in relation to conduct*, entails that the actor intends to engage in a particular course of conduct when he or she chooses to do it. In contrast, *intention in relation to consequence*, entails that the actor ‘intends to bring about (or avoid)’ certain results when he or she sets out on purpose to bring them about or to prevent them.³⁷ It should be noticed that Cane employed notions as ‘aim, purpose, and objective’ to define *intention in relation to consequence*, as they can be taken as the conceptual core of intention,³⁸ not because he meant to exclude other forms of intention.³⁹

It is a widely shared view in the modern law that the defendant must not merely ‘intend to commit the act’, but he also needs to ‘intend the consequence’.⁴⁰ An important reason may be that negligence cases commonly involve deliberate acts or intentions in relation to these acts as well. This view can possibly explain why, in controversies over tortious intention, *intention in relation to consequence* is always the issue which actually matters. For example, in respect of the dicta found in *Wilkinson*, discussion

³⁵ P Cane, ‘Mens Rea in Tort Law’ (2000) 20 OJLS 533 at 534. Also see D Priel, ‘A Public Role for the Intentional Torts’ (2011) 22 KLJ 183 at 188.

³⁶ Cane (n 35) at 534.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Subsequently Cane introduced other possible constituents of a broad concept of tortious intention. See *ibid* at 535-538.

⁴⁰ S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin’s Tort Law* (7th edn, 2013) 359. Please refer to E Reid, ‘Malice in the Jungle of Torts’ (2013) 87 TulLRev 901 at 902: ‘...the intentional torts require that the interaction between wrongdoer and victim must have been in some sense intended and that there must have been some level of intention as to the outcome of that interaction in terms of harm suffered by the victim’. Also see Restatement (Third) of Torts §1 (2010); C Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (hereinafter DCFR)* (2010) §VI-3:101. Both require that there must be some level of intention as to the consequence or the damage caused.

more often revolves around the meaning of ‘calculated to cause physical harm’ rather than ‘(having) wilfully done an act’. The former can be observed as an expression of *intention in relation to consequence*, whereas the latter can be taken as signifying an *intention in relation to conduct*.

3.22 The object of intention

Since discussion tends to concern intention in relation to consequence, the *consequence* becomes a crucial issue. The *consequence* referred to here is what the actor intends to bring about, rather than what actually happens. In other words, it is the *object of intention*. What is the *object of intention* in respect of this tort? In *Wilkinson v Downton*, where the defendant desired to play a practical joke, Wright J regarded him as having ‘calculated to cause physical harm’.⁴¹ If ‘calculated to cause physical harm’ can be taken as an expression of *intention in relation to consequence*, without doubt the intended consequence, or the object of intention, should be *physical harm*. However, there are criticisms cast on this interpretation. As Lunney pointed out, on the basis of analysis of contemporary sources, Wright J used the words ‘calculated to cause physical *pain*’ when he delivered this decision in court,⁴² but he altered the expression into physical *harm* before the case was reported.⁴³ The underlying reason might be, as argued by Lunney, that the law at that time was uneasy with actions based upon mental suffering in the absence of any physical injury.⁴⁴ This argument can also be supported by the fact that, after expressing ‘calculated to cause physical harm’, in the following paragraph, rather than using the term ‘physical harm’, Wright J adopted expressions such as ‘calculated to produce some effect’, ‘[i]t is difficult to imagine that such a statement...could fail to produce grave effects...’, as well as ‘an intention to produce such an effect’.⁴⁵ Moreover, Wright J subsequently addressed the issue of

⁴¹ *Wilkinson v Downton* (n 1) at 58-59 per Wright J.

⁴² M Lunney, ‘Practical Joking and Its Penalty: *Wilkinson v Downton* in Context’ (2002) 10 Tort L Rev 168 at 181.

⁴³ *ibid* at 182.

⁴⁴ *ibid*.

⁴⁵ *ibid* at 181. Also see *Wilkinson v Downton* (n 1) at 59 per Wright J.

remoteness in his judgment.⁴⁶ If indeed he regarded the defendant's conduct as 'calculated to cause physical harm', there should have been no question of remoteness in relation to the factually inflicted physical harm, as 'intended harm is never too remote'.⁴⁷ In similar vein, Réaume has argued that, in the context of *Wilkinson v Downton*, it seems implausible to construe the object of intention (on the part of the defendant) as physical harm or 'nervous shock injury', since they were hardly foreseeable.⁴⁸ Accordingly, Réaume has suggested that the object that the defendant calculated upon or intended to cause should be interpreted as either 'distress' or 'physical response'.⁴⁹ The contentious question of the object of intention has also been raised in *Rhodes v OPO*,⁵⁰ and the Supreme Court indicated that an intention to cause '(at least) severe mental or emotional distress' can satisfy the required mental element of this tort.⁵¹ In other words, the judgment in *Rhodes* has clarified that 'severe mental or emotional distress' suffices as the object of intention of this tort, although in some cases the object may be more severe harm, e.g. psychiatric illness or physical harm. Notably, this object of intention should be distinguished from the required consequence element,⁵² for which 'severe mental or emotional distress' is not sufficient.

3.3 Intention based upon purpose

As mentioned above, the phrase 'calculated to cause physical harm' employed in *Wilkinson v Downton* has received much practical and academic attention. The meaning of 'calculated' is as problematic as the concept of intention. To elucidate the concept of intention has never been an easy task, especially in the sphere of *intention in relation to consequence*. Complex and equivocal judicial interpretations exacerbate these difficulties. According to the case law reviewed in this chapter, there are three

⁴⁶ *Wilkinson v Downton* (n 1) at 59-60 per Wright J.

⁴⁷ Lunney (n 42) at 180.

⁴⁸ D Réaume, 'The Role of Intention in the Tort in *Wilkinson v Downton*' in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (2007) 533 at 540-541.

⁴⁹ *ibid* at 541-542.

⁵⁰ *Rhodes v OPO* (n 16) at para 83 per Lady Hale and Lord Toulson.

⁵¹ *ibid* at paras 87 and 88 per Lady Hale and Lord Toulson.

⁵² *ibid* at para 88 per Lady Hale and Lord Toulson.

possible constructions of the term ‘calculated’, namely ‘acting with the desire or purpose (to bring about the complained consequence)’; ‘foreseeing (in an actual or constructive manner) with substantial certainty the consequence to occur’; or ‘foreseeing (in an actual or constructive manner) the likelihood of the consequence to occur’.

The first possible construction of ‘calculated’ is *having/acting with a desire* or a *purpose* to bring about the disputed consequence. Likewise, it seems to be a widely accepted view that the quintessential character of intention lies in the actor’s *purpose* to incur some result. Many tort lawyers share the opinion that a person intends a consequence provided that it is his purpose, plan, or aim to bring the consequence about.⁵³ If a tortfeasor directs his mind to the disputed conduct and purposes/desires certain consequences to occur,⁵⁴ his act should be deemed as intentional (in relation to the consequences).

3.31 The adoption of intention based upon purpose in law

In this connection, the Restatement (Third) of Torts §1 plainly employs ‘acts with the purpose of producing that consequence’ as a form of intention,⁵⁵ whilst the DCFR §VI-3:101 adopts the wordings ‘meaning to cause damage of the type caused’.⁵⁶ In addition there is case law in relation to this tort, from England as well as from other jurisdictions, indicating or implying that the term ‘calculated’ or the concept of intention could be construed as *purpose, aim, or desire*. For instance, in *C v D, SBA*, three levels of bases for imputation of the necessary intention are discussed.⁵⁷ The first

⁵³ J Finnis, ‘Intention in Tort Law’ in D Owen (ed), *Philosophical Foundations of Tort Law* (1995) 229 at 229; Cane (n 35) at 534; D Stilitz and P Sales, ‘Intentional Infliction of Harm by Unlawful Means’ (1999) 115 LQR 411 at 436; DM Walker, *The Law of Delict in Scotland* (2nd rev edn, 1981) 43 and 165. Also see Restatement (Third) of Torts §1 (2010) (n 40) (a), which stipulates that the person ‘acts with the purpose’ of generating a certain consequence should be considered as acting ‘with the intent’ to generate that consequence.

⁵⁴ Walker (n 53) 43.

⁵⁵ Restatement (Third) of Torts §1 (2010) (n 40).

⁵⁶ DCFR §VI-3:101.

⁵⁷ *C v D, SBA* [2006] EWHC 166 (QB) at para 99 per Justice Field.

level is that ‘the acts of the defendant are *calculated to* cause psychiatric harm and are done with the knowledge that they are likely to cause such harm’; ‘[t]he second is that psychiatric injury is *sufficiently likely* to result from the conduct complained for the defendant not to be heard to say that he did not “mean” it’; ‘[t]he third is that the defendant was reckless as to whether he caused psychiatric harm’. Comparing these three bases, and, in particular, observing that the first separates ‘*calculated to* cause psychiatric harm’ from ‘done with the knowledge that...’, it appears obvious that the term ‘*calculated*’ here should imply something closer to ‘purpose’ or ‘aim’, rather than pure knowledge.

In *Wainwright v Home Office*, Lord Hoffmann was of the opinion that ‘the necessary intention was not established’ in the particular circumstances of the case, and ‘the claimants can build nothing on *Wilkinson v Downton*’.⁵⁸ Notably, despite fully agreeing with Lord Hoffmann’s reasoning and conclusion,⁵⁹ Lord Scott of Foscote conceded that the prison officers intended to humiliate and to incur distress, stating that ‘the absence of any possible justification for the handling of Alan’s penis allows the inference to be drawn that it was a form of bullying, done with the intention to humiliate’.⁶⁰ Nevertheless, Lord Scott still regarded the ‘infliction of humiliation and distress by conduct calculated to humiliate and cause distress’ as *not* tortious on its own.⁶¹ From the wording of ‘bullying’ and ‘intention to humiliate’, it appears warranted to say that the intention mentioned by Lord Scott here denotes an intention based upon *purpose*.

As discussed above, if the object of intention in *Wilkinson* is taken as ‘physical harm’, it would be implausible, even impossible, to construe the mental state of the defendant as an intention based upon *purpose*. Because the defendant simply wanted to play a practical joke, he did not desire or have it as his purpose to bring about any physical harm to the plaintiff. Therefore, in *Wilkinson v Downton* it was held that ‘no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the

⁵⁸ *Wainwright v Home Office* (n 12) at para 47 per Lord Hoffmann.

⁵⁹ *ibid* at paras 56 and 62 per Lord Scott of Foscote.

⁶⁰ *ibid* at para 61 per Lord Scott of Foscote.

⁶¹ *ibid* at para 62 per Lord Scott of Foscote.

defendant’,⁶² and in *Rhodes v OPO* the majority of Supreme Court opined that Wright J was adopting the term ‘calculated’ in the sense of ‘likely’⁶³ rather than of having physical harm as his ‘purpose’. However, instead of physical harm, if the object of intention is construed as ‘some effect of the kind which was produced’⁶⁴ or (significant) emotional distress, it becomes more likely that the intention imputed in this case could connote an *intention based upon purpose*.⁶⁵ The very aim of the person who plays a practical joke can be seen as to trigger some (severe) reactions, effects, even distress. After the decision in *Rhodes v OPO*, the object of intention in this tort has been clarified as ‘at least severe mental or emotional distress’.⁶⁶ In the light of this change as regards the object of intention, Lord Neuberger advised that ‘the fact that a statement is intended to be a joke is not inconsistent with the notion that it was intended to upset...That was the very purpose of the so-called joke’.⁶⁷ This comment indicates the likelihood that the intention or calculation on the part of the defendant in *Wilkinson v Downton* could be interpreted as a *purpose* (intention based upon *purpose*), as long as the object of intention is observed as significant emotional distress instead of physical harm.

There is also commonwealth authority in parallel circumstances, where the intention or calculation on the part of the defendant can be construed as *purpose, aim, or desire*. In a Canadian case, *Boothman v R*, where the defendant’s employee exploited the plaintiff’s emotional fragility, conducting multiple acts and ‘bringing her to collapse mentally’⁶⁸ in order to force her resign from her position, Noël J regarded him as harbouring ‘malicious purpose to cause the plaintiff to breakdown mentally’.⁶⁹ In other words, while inflicting mental harm on the plaintiff, the mental state of the defendant’s employee could be deemed to be intention based upon *purpose*. In another Canadian

⁶² *Wilkinson v Downton* (n 1) at 59 per Wright J.

⁶³ *Rhodes v OPO* (n 16) at para 36 per Lady Hale and Lord Toulson. Whether or not this is the most appropriate interpretation of the term ‘calculated’ will be further explored in the following sections.

⁶⁴ *Wilkinson v Downton* (n 1) at 59 per Wright J.

⁶⁵ Certainly, it is also possible for this imputed intention to be interpreted as the foresight of the consequence with substantial certainty or even recklessness. These two notions will be examined in the following sections.

⁶⁶ *Rhodes v OPO* (n 16) at para 88 per Lady Hale and Lord Toulson.

⁶⁷ *ibid* at para 112 per Lord Neuberger.

⁶⁸ *Boothman v R* [1993] 3 FC 381 at para 106 per Noël J.

⁶⁹ *ibid*.

case, *Prinzo v Baycrest Centre for Geriatric Care*, Weiler JA analysed the prerequisites of the *Wilkinson* tort and held that the requirement of ‘calculated to produce harm’ can be satisfied where ‘the actor desires to produce the consequences that follow from the act’ or where ‘the consequences are known to be substantially certain to follow’.⁷⁰ Following *Prinzo*, in *High Parklane Consulting Inc v Royal Group Technologies Ltd*, Perell J also set out three essential elements of the tort of ‘intentional infliction of mental distress or shock’, advising that the requirement of ‘calculated to produce harm’ can be met where ‘the actor desires to produce the consequences that follow from the act’ or where ‘the consequences are known to be substantially certain to follow’.⁷¹ These two Canadian cases indicate that the term ‘calculated’, or the intention element of the *Wilkinson* tort, is to be construed as encompassing *intention based upon purpose*. In a more recent Canadian case, *Boucher v Wal-Mart Canada Corp*, Laskin JA found that, in order to force the plaintiff (the respondent) to resign, the defendant (the appellant) ‘wanted to cause her so much emotional distress or mental anguish’ through relentlessly humiliating and belittling her.⁷² The expression of ‘wanted to cause (severe emotional distress)’ adopted here can also be read as the *desire, aim, or purpose* on the part of the defendant.

Moreover, in an Australian case, *Carrier v Bonham*, whilst analysing the *Wilkinson* tort, McPherson JA had interpreted the term ‘calculated’ as either ‘subjectively contemplated and intended’ or ‘objectively likely to happen’.⁷³ The former interpretation looks similar to intention based on *purpose*. Following this opinion, in another well-known Australian case, *Nationwide News Pty Ltd v Naidu*, although it was unnecessary to decide the meaning of the expression ‘calculated’, Spigelman CJ observed that this notoriously ambivalent term can be construed as a ‘subjective, actual, conscious desire to bring about a specific result’, or ‘what is likely, perhaps overwhelmingly likely, to occur considered objectively’, even including ‘reckless

⁷⁰ *Prinzo v Baycrest Centre for Geriatric Care* [2002] OJ No 2712 at paras 43 and 45 per Weiler JA.

⁷¹ *High Parklane Consulting Inc v Royal Group Technologies Ltd* [2007] OJ No 107 at paras 31 and 32 per Perell J.

⁷² *Boucher v Wal-Mart Canada Corp* 2014 ONCA 419 at paras 50-51 per Laskin JA.

⁷³ *Carrier v Bonham* [2001] QCA 234 at para 25 per McPherson JA.

indifference to a result'.⁷⁴ Likewise, the first of these three constructions can be taken as an intention based on *purpose*.

3.32 Analysis

From the case law reviewed above in relation to the *Wilkinson* tort or the tort of 'intentional infliction of mental harm', it can be observed that the notion of *intention based upon purpose* – namely the possession of a *purpose* or a *desire*⁷⁵ on the part of the actor to bring about the disputed consequence – is widely employed in legal practice. In addition, with regard to the concept of intention, three elements can be differentiated: (a) intention based upon purpose (or desire), as mentioned; (b) intention based upon knowledge, knowing or foreseeing that one particular consequence is sufficiently likely, overwhelmingly likely, or substantially certain to result; (c) recklessness or reckless indifference. The second and third will be further investigated in subsequent sections. Furthermore, three points deriving from the above case-review are of considerable relevance to the notion of *intention based upon purpose*, and will be discussed below as follows: (1) the notion of intention based upon *ends or means*; (2) the means of establishing purpose, aim, or end; (3) the boundary between *intention based upon purpose* and *motive*.

⁷⁴ *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377 at paras 77 and 80 per Spigelman CJ.

⁷⁵ Noticeably, 'desire' may be an equivocal term to use and define. According to Finnis, 'desire' can possibly be interpreted in two senses. In sense (a) – rational or volitional desire, a certain act or consequence is desired when it is 'freely chosen' as an 'intelligent and rationally appealing option'. In contrast, desire in sense (b) – emotional desire – denotes one's reactions to something that 'appeals to one's feeling'. Finnis regards the 'concept of intention used in moral and legal reasoning' as closely tied to 'desire' in sense (a), since 'it is tightly linked to the moral significance of choice'. One's aim or purpose is closely connected with one's sense (a) desire – the rational or volitional desire, because 'one's purpose is in one aspect desired, volitionally, by reason of an intelligible good'. Yet what one chooses, intends, or purposes to do is not necessarily what one emotionally desires (the sense [b] desire). See J Finnis, 'Intention and Side Effects', *Intention and Identity: Collected Essays Volume II* (2011) 174 at 175-179.

3.321 The notion of intention based upon *ends or means* –

An extended version of intention based upon *purpose*?

Some of the cases discussed above showed that, despite the actor possessing a *purpose* or *desire* to bring about the consequence – e.g. to inflict mental harm – the causation of the consequence is not an end in itself or the ultimate end, but merely the means by which another more remote or ultimate end can be achieved. Nevertheless, the finding of *intention* or *purpose* still prevailed in these cases. For instance, in *Boothman v R* or in *Boucher v Wal-Mart Canada Corp*, the wrongdoers were held to have had a ‘purpose’⁷⁶ or as ‘wanted’⁷⁷ to bring about severe emotional distress to the plaintiffs, in order to achieve another (ultimate) purpose, which was to force them to quit their job. In *Timmermans v Buelow*, the defendant Buelow was regarded as having ‘intended’ to ‘play on the plaintiff’s fears’, in order to pressure him to ‘vacate the premises immediately’ and, further, to ‘put the prospective tenant into possession’.⁷⁸

The English case of *Janvier v Sweeney* may also illustrate this category. Duke LJ held that the defendant’s false statements had been made with ‘an intention to terrify the plaintiff for the purpose of attaining an unlawful object’.⁷⁹ A T Lawrence J thought that ‘[t]he means they used were false statements made to the plaintiff *calculated* to cause terror’.⁸⁰ In other words, the defendants’ calculation to cause terror and distress (through false statements) was merely regarded as the *means* to another purpose (to obtain an unlawful object). Nevertheless, an intention (to terrify) was still found. Similarly, in *Rhodes v OPO*,⁸¹ the examples of the ‘hostage taker’⁸² and the ‘blackmailer’⁸³ raised by the Supreme Court also explicitly illustrate the notions as

⁷⁶ *Boothman v R* (n 68) at para 106 per Noël J. ‘Not only was there general wilful injuria of the *Wilkinson* type, but there was also the malicious purpose to cause the plaintiff to breakdown mentally.’

⁷⁷ *Boucher v Wal-Mart Canada Corp* (n 72) at para 51 per Laskin JA, ‘He wanted to get Boucher to resign. To do so, he wanted to cause her so much emotional distress or mental anguish that she would have no alternative but to quit her job.’

⁷⁸ *Timmermans v Buelow* [1984] OJ No 2408 at para 30 per Catzman J.

⁷⁹ *Janvier v Sweeney* (n 5) at 326 per Duke LJ.

⁸⁰ *ibid* at 328 per A T Lawrence J.

⁸¹ *Rhodes v OPO* (n 16) at para 85 per Lady Hale and Lord Toulson.

⁸² ‘[A] hostage taker demands money from the family of the hostage (H) for his safe release’.

⁸³ ‘[A] blackmailer threatens harm to a person unless the family of the victim (V) meets his demands’.

regards *ends or means*. In these hypothetical circumstances, the majority of the Supreme Court observed that the wrongdoer ‘intended to cause severe distress to the claimant’ as ‘the means of trying to achieve his demand’.⁸⁴

In the light of these decisions and examples, although the *purposeful or desired infliction of mental harm* is merely an intermediary end or a *means* to reach a remoter or ultimate end, this does not affect the finding of *intention* or *purpose* in these cases. In other words, besides the ultimate purpose, it appears that the notion of *purpose*, or intention based upon *purpose* can extend to cover the *intermediary purpose* or the *means* to the final end. This idea is also supported by Finnis, who has argued that ‘[m]eans, then, are purposes. But they are instrumental purposes, adopted for their intelligible appeal as promising to bring about the further purposes’.⁸⁵ Furthermore, Finnis defines tortious intention as ‘what one chooses, whether as end or as means...everything which is part of one’s plan (proposal), whether as purpose or as way of effecting one’s purpose(s) – everything which is part of one’s reason for behaving as one does’.⁸⁶ The notion of intention based upon *purpose* can thus be translated into the idea of intention based upon *ends or means*. Intention based upon *ends or means* can be taken as an extended version of intention based upon *purpose*.

3.322 Establishing purpose, aim, or end

As regards the notion of intention based upon *purpose*, or the intention based upon *ends or means*, the most important question is how to establish that the actor has it as his or her purpose, desires, or aims to bring about one particular result. Where the actor chooses to engage in a voluntary path of conduct, as distinct from unconscious conduct

⁸⁴ *Rhodes v OPO* (n 16) at para 85 per Lady Hale and Lord Toulson.

⁸⁵ Finnis (n 75) at 180.

⁸⁶ Finnis (n 53) at 229.

such as sleepwalking,⁸⁷ usually he or she has one plan or proposal in mind.⁸⁸ Whether or not the actor has one particular result as his or her purpose can be probed by the following test:⁸⁹ in the event that the actor's deliberate conduct had not resulted in this particular consequence, would the actor have considered his or her plan as a failure.⁹⁰ The following illustrates.

In the rain forest of Peru, A deliberately pulls the trigger of a gun. Due to extreme hunger, A very much hopes that some wild animal can be hit and killed, and he has no idea that any other human being is in the neighbourhood. However, B is in the vicinity and struck by the bullet after the discharge of the gun. A is surprised and regrets B's death, and A would never agree with cannibalism.⁹¹

In this example, A engages in his conduct voluntarily and deliberately, with the plan in his mind to hit some wild animal(s) to feed himself. The result turns out to be that B has been struck instead. The doctrine of 'transferred intent' may not apply here since A does not plan to kill a human at all, and he is unaware of the existence of any person in the vicinity.⁹² Moreover, A will not eat B. Whether or not B lived was incidental, even irrelevant, to A's plan, which would succeed only if A had killed an animal. Therefore, A does not have the purpose, or an intention in this sense, of killing B.

⁸⁷ If a sleepwalker or a person 'in a condition of complete automation' brings about damage to other people, this conduct is not voluntary or controlled by his or her free will, so that what he or she has done may not be actionable: see Walker (n 53) 34. The primary authority on this point is the case of *Waugh v James K Allan Ltd* 1964 SC (HL) 102 (lorry driver having heart attack at wheel incapable of negligence from that point). This case contrasts with *Dunnage v Randall* [2016] QB 639 (person in grip of severe mental illness who set fire to himself and severely burned the claimant still capable of negligence).

⁸⁸ Finnis (n 53) at 229.

⁸⁹ This is dubbed the 'test of failure'. See RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) 61: 'If my action does not produce an expected effect, will it have been a failure? If so, that effect is one which I acted with the intention of bringing about; if not, it is merely a foreseen side-effect of my action...an effect whose occurrence or non-occurrence is irrelevant to the success or failure of my action is not one which I act with the intention of bringing about'.

⁹⁰ *ibid.* Also see J Herring, *Criminal Law* (8th edn, 2018) 127-128; AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (6th edn, 2016) 136.

⁹¹ This instance is adapted from one example provided in the Restatement, see Restatement (Third) of Torts §1 (2010) (n 40) Comment b Illustration 1.

⁹² In contrast, in cases where the tortfeasor 'intends to injure one person', yet 'another person is injured instead', the doctrine of 'transferred intent' may be applicable, allowing the tortfeasor to be deemed in law as 'intended' to inflict the injury upon the victim. See *ibid* Comment b.

This test can also be applied to some of the cases reviewed earlier, to see whether or not there existed an intention based upon *purpose* (or *ends or means*). In *Rhodes v OPO*,⁹³ if publishing the autobiographical material did not harm the child mentally, would the defendant have regarded his plan as a failure? The answer is obviously a *no*. The defendant wanted to share his story and to unveil his history to the world, without any desire to hurt his child; nor was emotional injury to his child the necessary and only means through which his ultimate end could be achieved. Therefore, whether or not severe emotional distress would be caused to his child was incidental to the defendant's plan. He should therefore be taken as harbouring *no* intention based upon *purpose* (or *ends or means*). By contrast, in *Janvier v Sweeney*,⁹⁴ if the plaintiff had not been terrified and distressed by the threat, she would probably not have cooperated with the defendant. Without her cooperation the ultimate goal of the defendants (to unlawfully obtain an object) would not have been achieved, and they would regard their plan as a failure. Similarly in *Boothman v R*,⁹⁵ if the plaintiff had felt comfortable with the threats and humiliation without being severely distressed, she would not have resigned, and the wrongdoer's plan would have been a failure. The same result applies to *Boucher v Wal-Mart Canada Corp.*⁹⁶ Likewise in *Timmermans v Buelow*,⁹⁷ if the plaintiff had not been frightened and significantly distressed by the defendant's threat, it is unlikely that he would have submitted to the wrongdoer's unlawful demand,⁹⁸ and the plan in the wrongdoer's mind (to have the apartment vacated and to bring in the prospective tenant) would have become a failure. In sum, except for *Rhodes*, it seems that the defendants in the other cases mentioned here did harbour an intention based upon *purpose* or an intention based upon *ends or means* (to inflict significant emotional distress).

Noticeably, in circumstances where the actor is found as having *no* intention based upon *purpose* (or *ends or means*), it is nevertheless likely that he or she might possess

⁹³ *Rhodes v OPO* (n 16).

⁹⁴ *Janvier v Sweeney* (n 5).

⁹⁵ *Boothman v R* (n 68).

⁹⁶ *Boucher v Wal-Mart Canada Corp* (n 72).

⁹⁷ *Timmermans v Buelow* (n 78).

⁹⁸ What factually happened was that the plaintiff was frightened but nevertheless did not give in.

other relevant forms of mental state, e.g. intention based upon knowledge (with substantial certainty) or recklessness. Even if a certain consequence does not appear to have been the actor's *purpose* (or *means* to the end), but wholly incidental to the actor's principal aim, it could be deemed to be the side-effect or by-product of the actor's conduct.⁹⁹ The (actual or constructive) knowledge/foresight with *substantial certainty* of the *side-effect's occurrence*, or the (actual or constructive) knowledge/foresight of *likelihood of the side-effect's occurrence* will be further explored respectively in the sections regarding 'Intention based upon knowledge'¹⁰⁰ and 'Recklessness'.¹⁰¹

3.323 The boundary between *motive* and intention based upon *purpose*

Wright J held in *Wilkinson v Downton* that 'no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant'.¹⁰² In the aforesaid cases where an intention based upon *ends or means* can be found, Noël J held the wrongdoer in *Boothman v R* to have possessed a 'malicious purpose to cause the plaintiff to breakdown mentally',¹⁰³ whilst Catzman J found in *Timmermans v Buelow* that the intentional infliction of fright and distress was 'motivated by [the defendant's] desire to put the prospective tenant into possession'.¹⁰⁴ Yet, in these decisions, the difference between *purpose* and *motive* was not identified. Is it really possible to draw a clear boundary between *motive* and *intention based upon purpose*? What roles do these concepts play in relation to this tort?

One interpretation of *motive* is, like intention, that it is a state of mind, and as both can be regarded as a form of state of mind, motive is often entangled with intention. Perhaps partly for this reason, the term 'malice' became a troubled one. The

⁹⁹ According to Finnis, if consequences do not lie inside one's original plan or proposal, 'neither wanted for their own sake nor needed as a means', they are 'side-effects' or 'incidental risks' despite their having been foreseen and even been accepted. See Finnis (n 53) at 244.

¹⁰⁰ See section 3.4.

¹⁰¹ See section 3.5.

¹⁰² *Wilkinson v Downton* (n 1) at 59 per Wright J.

¹⁰³ *Boothman v R* (n 68) at para 106 per Noël J.

¹⁰⁴ *Timmermans v Buelow* (n 78) at para 30 per Catzman J.

complexity of malice lies in its being employed in two layers of senses: motives on the one hand and intention to injure on the other.¹⁰⁵ This view is supported by Fridman's observation that malice could be interpreted in four ways: 'spite or ill-will'; 'any improper motive'; 'the intent to do a wrongful act'; and 'the intent to inflict injury without just cause or excuse'.¹⁰⁶ Drawing together these four interpretations, the essence of malice can roughly be seen as the motive to do harm, or the intention to act or to do harm. This mix generates considerable complexity and lack of clarity.¹⁰⁷ Indeed it has been advocated that the term malice should be avoided due to destabilising and divisive effect upon the intentional torts.¹⁰⁸ However, even if the use of this term is itself discontinued, the two notions that it combines, namely intention and motive, as well as their interaction with each other, still require to be clarified.

Cane has argued for differentiating intention and motive, on the basis that the latter is the *reason or ground why the actor engaged in the disputed conduct or brought about its consequence*.¹⁰⁹ This definition is compatible with the word's literal meaning.¹¹⁰ Intention and motive might coincide with each other under some circumstances but diverge in others. For instance, they may coincide when the actor has the purpose of bringing about a certain result because he wholeheartedly wants it to occur. They may diverge when a person deliberately engages in his/her conduct in order to perform a promise but without any desire to do it.¹¹¹ But although it is correct in saying that intention and motive might coincide in some situations but diverge in others, as

¹⁰⁵ E Reid, "'That Unhappy Expression': Malice at the Margins' in SGA Pitel, JW Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 441 at 442. Also see Reid (n 40) at 903-904.

¹⁰⁶ GHL Fridman, 'Malice in the Law of Torts' (1958) 21 MLR 484 at 484.

¹⁰⁷ *ibid.* Also see Reid (n 40) at 903. For another brief introduction of historical liability for malice please refer to K Oliphant, 'The Structure of the Intentional Torts' in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (2007) 509 at 520-522.

¹⁰⁸ Reid (n 40) at 928; Reid (n 105) at 460-461. Also see Cane (n 35) at 539.

¹⁰⁹ Cane (n 35) at 539. Please also see Reid (n 40) at 904; Reid (n 105) at 442.

¹¹⁰ The *Oxford English Dictionary* lists a variety of definitions for the term 'motive'. Under the head of 'Senses relating to inner impulses and mental activities', motive can be construed as 'an impression or apprehension that prompts a person to action', 'an inward prompting or impulse', or 'a circumstance or external factor inducing a person to act in a certain way; a desire, emotion, reason, argument, etc., influencing or tending to influence a person's volition'. The more generally used definition is offered as 'the reason or cause behind something'. The definition in relation to Law is submitted as 'a purpose, end, or interest which motivates someone to commit an illegal, esp. criminal, act'.

¹¹¹ Cane (n 35) at 539.

demonstrated in case law discussed further below, the latter instance raised by Cane does not properly illuminate the divergence between intention and motive, but merely signifies their convergence.¹¹²

Admittedly in relation to this tort, the notions of intention based upon *purpose* and of *motive* cannot easily be differentiated. They often overlap, or, in Cane's words, converge. As motive is denoted as the *reason or ground why one wishes to engage in a particular behaviour (or to bring about the consequence of it)*, in many circumstances asking 'why, or for what reason did one engage in this act' is tantamount to questioning 'what is one's purpose for conducting this act'. For instance, A deliberately engages in a threatening or insulting conduct to inflict severe emotional distress upon B. Due to A's animosity against B, A truly wishes to inflict serious hurt upon B. In this scenario, the *purpose* of A's conduct is not different from its *reason*. Likewise, after the reformulation of the object of intention in *Rhodes*, Downton's practical joke may be construed as demonstrating the *purpose* or *desire* to bring about an emotional reaction, even significant emotional distress, on the part of Mrs Wilkinson. Based on this construction, the *purpose* and the *reason* for the defendant's conduct (in *Wilkinson v Downton*¹¹³) were understood in similar terms. Therefore, in these two examples, the intention based upon *purpose* and *motive* on the part of the defendant converge.

On the other hand, in several instances, it is possible to distinguish *motive* from intention based on *purpose*. In *Rhodes v OPO*, the required object of intention was said to be 'at least severe mental or emotional distress'.¹¹⁴ And, as discussed, *purpose (ends or means)* can be taken as the first basis of intention.¹¹⁵ Hence, to be considered as an intention (based upon purpose) in this context, the purpose at issue should *be directed*

¹¹² Namely, in the latter instance where a person engages in a conduct in order to perform his promise without any desire to do it, the *reason, ground, or purpose* of his act is to perform his promise or not to breach his promise, which is precisely the *motive* of his conduct, whether he desires it or not. Motive is related but not limited to desire (in the sense of emotional feeling). Therefore, in his latter example, the actor's motive is in fact identical with his intention (based upon *purpose*) – to perform or not to breach his promise, although the actor emotionally dislikes what he is going to do.

¹¹³ *Wilkinson v Downton* (n 1).

¹¹⁴ *Rhodes v OPO* (n 16) at para 88 per Lady Hale and Lord Toulson.

¹¹⁵ The second basis of intention, intention based upon knowledge (foresight with substantial certainty) will be examined in the next section.

at ‘(at least) severe mental or emotional distress’. If the purpose directly attaches to any object *other than* ‘severe mental or emotional distress’ (or other than ‘recognised psychiatric illness’ or ‘physical harm’), the nature of the intention (based upon purpose) is not as required for this tort, and can be taken as *motive* as long as it meets the definition of *motive*.¹¹⁶ In some of the cases reviewed here concerning *intention based on ends or means*, apart from the actor’s *purpose* to bring about significant emotional distress, there exist other more remote or ultimate ends to be fulfilled. These more remote or ultimate purposes/ends should be taken as *motive* since 1) they are not the intention (based upon purpose) of the type required for this tort; and 2) they are the ultimate *reason* or *ground* of the actor engaging in the conduct. For instance, in *Janvier v Sweeney*, a mental state directed at terrifying and distressing the plaintiff should be taken as an *intention* (based upon *ends or means*), whilst the aim to force her to help them obtain a certain object is the *motive*.¹¹⁷ In *Boothman v R*¹¹⁸ or in *Boucher v Wal-Mart Canada Corp*,¹¹⁹ the defendants’ *purpose* to impose severe emotional distress on the plaintiffs should be taken as *intention*, but their ultimate *objective* to pressure the plaintiffs into resigning is the *motive*. In *Timmermans v Buelow*, the desire to inflict fright and distress on the plaintiff is *intention*, while the more remote aim to press him to vacate the premises and to ‘put the prospective tenant into possession’¹²⁰ should be considered as the *motive*.

In comparison to the purpose treated as *intention*, less significance attaches to the remoter purpose, desire, or end treated as *motive*. However, if the *motive* at issue is connected with an *unlawful* act or consequence, and all other elements required in this tort have been met, it is likely that the finding of *unlawful motive* could increase the gravity of the wrongdoing. In other words, *unlawful motive* may be an aggravating or exacerbating factor for this tort. For instance, Duke LJ found *Janvier v Sweeney* as a stronger case than *Wilkinson v Downton*, because ‘there was an intention to terrify the

¹¹⁶ The reason or ground why one did engage in the disputed conduct or bring about the consequence of it. See Cane (n 35) at 539. See also Reid (n 40) at 904; Reid (n 105) at 442.

¹¹⁷ *Janvier v Sweeney* (n 5).

¹¹⁸ *Boothman v R* (n 68).

¹¹⁹ *Boucher v Wal-Mart Canada Corp* (n 72).

¹²⁰ *Timmermans v Buelow* (n 78) at para 30 per Catzman J.

plaintiff for the purpose of attaining an unlawful object’ in the former case.¹²¹ In a similar vein, pursuant to the Restatement (Third) of Torts §46, when deciding the severity of the wrongdoing – namely, whether the disputed conduct is ‘extreme and outrageous’, the ‘motivation of the actor’ is also a factor to be taken into account.¹²² In jurisdictions where aggravated or punitive (exemplary) damages are applicable, the increased gravity of the conduct, or the outrageousness of the wrongdoing, can possibly trigger an award of aggravated or punitive (exemplary) damages.¹²³ In jurisdictions where aggravated or punitive (exemplary) damages are inapplicable, the elevated gravity of conduct may still affect the quantum of compensation or the justifiability of the disputed conduct. In terms of justifiability (discussed in Chapter 2), the more egregious the wrongdoing the stronger the defence or ground that is needed for it to be justified.

3.4 Intention based upon knowledge (foresight with substantial certainty)

3.41 Basic definition and background

As mentioned in the previous section, after completion of the ‘test of failure’, even if a certain consequence does not appear to be the purpose, or the means to the actor’s ultimate purpose, then it could be deemed to be a mere *side-effect* of the actor’s conduct.¹²⁴ In the light of the actor’s cognition and knowledge, *foreseen* and *unforeseen* side-effects are to be differentiated. The essential question is: can the concept of intention be extended to the state of mind in which the actor has foreseen, with substantial certainty or high probability, certain side-effects of his deliberate

¹²¹ *Janvier v Sweeney* (n 5) at 326 per Duke LJ.

¹²² Restatement (Third) of Torts §46 (2012) Comment d.

¹²³ For examples, in the aforementioned three Canadian cases *Timmermans v Buelow*, *Boothman v R*, and *Boucher v Wal-Mart Canada Corp*, where unlawful motives were found in addition to the requisite intention, either aggravated damages (in *Timmermans*), or punitive damages (in *Boothman*), or even both (in *Boucher*) were awarded for the defendants’ malicious or outrageous conduct. See *Timmermans v Buelow* (n 78) at para 38 per Catzman J; *Boothman v R* (n 68) at para 122(3) per Noël J; *Boucher v Wal-Mart Canada Corp* (n 72) at paras 110-111 per Laskin JA.

¹²⁴ In ‘Intention and Side Effects’, Finnis defines side effects in relevant moral or legal sense as ‘effects which are not intended as end or means’, or effects which ‘figure neither as end nor as means in the plan adopted by choice’. See Finnis (n 75) at 181.

conduct?¹²⁵ It is submitted that intention can also be defined in a sense which refers simply to the knowledge of consequences,¹²⁶ where a harm or result is actually foreseen,¹²⁷ not merely foreseeable.¹²⁸ In addressing this issue Sidgwick contended that ‘for purposes of exact moral or jural discussion, it is best to include under the term “intention” all the consequences of an act that are foreseen as certain or probable; since it will be admitted that we cannot evade responsibility for any foreseen bad consequences of our acts by the plea that we felt no desire for them, either for their own sake or as means to ulterior ends’.¹²⁹ Certainly, there are arguments for and against the inclusion of the knowledge of consequence under the original concept of intention. These arguments will be explored after consideration of some authorities which have mentioned or adopted knowledge-based intention. Notably, since the notion of intention as analysed in this section is based on *knowledge* or *foresight*, whether *actual* knowledge (foresight) should be categorically required or whether *constructive* knowledge (foresight) can also be accepted, becomes an important question to be answered.

3.42 Legal authorities and case law

In accordance with the Restatement (Third) of Torts §1, ‘a person acts with the intent to produce a consequence’ provided that ‘(b) the person acts knowing that the consequence is substantially certain to result’;¹³⁰ whilst the DCFR §VI–3:101 submits that ‘a person causes legally relevant damage intentionally when that person causes

¹²⁵ This question will be examined below. According to Oliphant, though this is a seldom addressed question, generally speaking, the answer appears to be ‘yes’. However, it is not the case in ‘unlawful means’ economic torts, e.g. *Douglas v Hello! Ltd (No 3)* [2006] QB 125; nor in the tort of ‘conspiracy to injure’. See Oliphant (n 107) at 515.

¹²⁶ Restatement (Third) of Torts §1 (2010) (n 40) (b); DCFR §VI-3:101; Oliphant (n 107) at 515; Reid (n 40) at 902-903; Also see WM Landes and RA Posner, *The Economic Structure of Tort Law* (1987) 149-150.

¹²⁷ The knowledge or awareness (with substantial certainty) on the part of the actor must be established. See Restatement (Third) of Torts §1 (2010) (n 40) Comment c.

¹²⁸ Admittedly, the boundary between what is ‘actually foreseen’ and ‘foreseeable’ may not be so clear. Whether or not ‘actual foresight’, rather than ‘foreseeability’, is required in this kind of knowledge-based intention will be explored in section 3.4433.

¹²⁹ H Sidgwick, *The Methods of Ethics* (7th edn, 1907) 202.

¹³⁰ Restatement (Third) of Torts §1 (2010) (n 40) (b).

such damage either (b) by conduct which that person means to do, knowing that such damage, or damage of that type, will or will almost certainly be caused'.¹³¹ Obviously both texts have accepted the principle that knowledge of a particular consequence (or damage) can be deemed as a foundation for intention, but the prerequisite is that the known likelihood of occurrence of that consequence must be high – in their words, be *substantially certain* or *almost certain*.

In *Austen v University of Wolverhampton*,¹³² a case involving mixed causes of action including defamation, breach of confidence, as well as intentional infliction of physical or emotional harm, Mr. Justice Gray ruled that 'the tort of intentional infliction of harm requires proof that the conduct of the defendant was wilful in the sense that the defendant intended to do the act which caused the alleged damage. I will assume in favour of the claimant that it is not necessary for him to show that the defendant intended to cause damage but just that the damage was the likely and foreseeable consequence of the defendant's intentional act'.¹³³ In other words, in terms of the claimant's burden of proof to establish the required intention in this tort, it is sufficient to show that the damage was the likely and foreseeable consequence of the defendant's deliberate act. No *actual* foresight on the part of the defendant (of the damage) nor (foresight with) *substantial certainty* is required.

Wong v Parkside Health NHS Trust concerned intentional harassment, predating the Protection from Harassment Act 1997, and was argued (partly) on the basis of *Wilkinson v Downton*.¹³⁴ The decision in *Wong* clarified that English law has not gone so far as to recognise that 'the tort is committed if there is deliberate conduct which will foreseeably lead to alarm or distress falling short of the recognised psychiatric illness...'.¹³⁵ However, if the degree of harm is not merely *foreseeable*, but is 'sufficiently likely to result', the defendant should be deemed as 'hav[ing] meant it to do so by the combination of the likelihood of such harm being suffered as the result of

¹³¹ DCFR §VI-3:101.

¹³² *Austen v University of Wolverhampton* [2005] EWHC 1635 (QB).

¹³³ *ibid* at para 10 per Mr Justice Gray.

¹³⁴ *Wong v Parkside Health NHS Trust* (n 9) at paras 5, 7-17 per Lady Justice Hale.

¹³⁵ *ibid* at para 11 per Lady Justice Hale.

his behaviour and his deliberately engaging in that behaviour'.¹³⁶ According to Lady Hale, what truly matters is whether the disputed conduct was 'of a nature which was sufficiently likely to result in such harm that an intention to produce it could be imputed to her'.¹³⁷ This decision thus makes clear that for an intention to be imputed to the actor, the likelihood or possibility of the occurrence of certain harm should be at a considerably high level. Notably, apart from foreseeability or constructive foresight, the *actual* foresight or knowledge on the part of the defendant is *not* emphasised in this case.

In *C v D, SBA*, a case where *Wilkinson v Downton* was also employed as one of the causes of action,¹³⁸ three bases were identified for imputing intention: where the defendant's acts are '*calculated* to cause psychiatric harm and are done with the knowledge that they are likely to cause such harm'; where 'psychiatric injury is sufficiently likely to result from the conduct complained for the defendant not to be heard to say that he did not "mean" it' (as in *Wong*); and where 'the defendant was reckless as to whether he caused psychiatric harm'.¹³⁹ The second basis can be taken as relevant to the notion of intention based upon knowledge analysed in this section. As in *Wong*, it should be noted that apart from the high degree of likelihood or foreseeability, *actual* foresight or knowledge on the part of the defendant was *not* stressed.

The majority of Supreme Court in *Rhodes v OPO* construed the term 'calculated' as 'likely to have an effect of the kind which was produced'.¹⁴⁰ More specifically, Lord Neuberger stated that '[t]here are statements (and indeed actions) whose consequences or potential consequences are so obvious that the perpetrator cannot realistically say that those consequences were unintended'.¹⁴¹ After the decision in *Rhodes v OPO*, in *ABC v WH 2000 Ltd v William Whillock*, leaving aside 'physical sexual abuse', the court analysed the requisite elements of the *Wilkinson* tort as reformulated by the

¹³⁶ *ibid* at para 12 per Lady Justice Hale.

¹³⁷ *ibid* at para 13 per Lady Justice Hale.

¹³⁸ *C v D, SBA* (n 57) at paras 88-90 per Mr Justice Field.

¹³⁹ *ibid* at para 99 per Mr Justice Field.

¹⁴⁰ *Rhodes v OPO* (n 16) at para 36 per Lady Hale and Lord Toulson.

¹⁴¹ *ibid* at para 112 per Lord Neuberger.

Supreme Court, holding that each element of this tort had been established.¹⁴² With regard to the mental element, the court considered it as ‘obvious’ that ‘the illicit relationship would in the end cause nothing but harm to the vulnerable Claimant...those consequences must have been entirely clear and obvious to Mr Whillock’.¹⁴³ In the light of the dicta drawn from these two cases, it appears that the degree of the likelihood (of the occurrence of certain consequences) requires to be considerably high, rendering the disputed consequences ‘clear and obvious’. From the wording adopted by the court in *ABC*, the court seems to have assumed *foresight* of the consequences, on the basis of their ‘entirely clear and obvious’ *foreseeability*.

In other jurisdictions, decisions relative to the *Wilkinson* tort indicate that intention or calculation on the part of the defendant can be interpreted as *knowledge* or *foresight* (with substantial certainty). In an important Canadian case, *Rahemtulla v Vanfed Credit Union*, the element of ‘plainly calculated to produce some effect of the kind which was produced’ was ‘established’, on the basis that ‘[i]t was clearly foreseeable that the accusations of theft which the defendant made against the plaintiff would cause her profound distress.’¹⁴⁴ In other words, the term ‘calculated’ was put on a par with ‘clearly foreseeable’. Likewise, *CVC Services v IWA-Canada, Local 1-71* is a case involving false or uninvestigated allegations. Apart from the conduct element¹⁴⁵ and the requirement of harm¹⁴⁶ in the tort of ‘intentional infliction of mental distress’, the mental element (or the element of ‘calculated to produce some effect’) was translated into ‘foreseeability’. It was held as ‘clearly foreseeable’ that ‘a false allegation of promiscuity would cause the grievor “profound distress”’.¹⁴⁷ Furthermore, in *Campbell v Wellfund Audio-Visual Ltd*, Clancy J also interpreted the element of ‘calculated to produce some effects’ as ‘clearly foreseeable’.¹⁴⁸

¹⁴² *ABC v WH 2000 Ltd v William Whillock* [2015] EWHC 2687 (QB) at para 89 per Sir Robert Nelson.

¹⁴³ *ibid*.

¹⁴⁴ *Rahemtulla v Vanfed Credit Union* [1984] 3 WWR 296 at para 56 per McLachlin J.

¹⁴⁵ *CVC Services v IWA-Canada, Local 1-71* 38 CCEL (2d) 141 at para 79 per Lanyon.

¹⁴⁶ *ibid* at para 81 per Lanyon.

¹⁴⁷ *ibid* at para 80 per Lanyon.

¹⁴⁸ *Campbell v Wellfund Audio-Visual Ltd* [1995] BCJ No 2048 at paras 101 and 102 per Clancy J.

In *Prinzo v Baycrest Centre for Geriatric Care*, a Canadian case reviewed in the previous section, Weiler JA clarified the prerequisites of the *Wilkinson* tort, holding that the requirement of ‘calculated to produce harm’ can be satisfied where ‘the consequences are known to be substantially certain to follow’, apart from where ‘the actor desires to produce the consequences that follow from the act’.¹⁴⁹ In parallel, in *High Parklane Consulting Inc v Royal Group Technologies Ltd*, after canvassing three requirements of the *Wilkinson* tort, or the tort of ‘intentional infliction of mental distress or shock’,¹⁵⁰ Perell J submitted that the element of ‘calculated to produce harm’ can be met where ‘the consequences are known to be substantially certain to follow’ or where ‘the actor desires to produce the consequences that follow from the act’.¹⁵¹ According to these Canadian decisions, it is apparent that the term ‘calculated’, or the mental element of this tort, can be construed as *knowledge* or *foresight* (with substantial certainty); *actual or subjective* knowledge or foresight does *not* seem to be categorically required, whilst *substantial certainty* appears to be an indispensable component.

3.43 Some inferences from the case law and authorities

The above authorities point to some provisional conclusions. Firstly, although the answer to whether the concept of intention can be extended to *knowledge or foresight* (with substantial certainty or high likelihood) may still differ between individual delicts or torts, at least in relation to this tort, both English and Commonwealth courts have employed (*constructive*) *knowledge or foresight* (with substantial certainty or high likelihood) as one basis of intention.

Secondly, a variety of expressions are used in relation to knowledge-based intention. The courts may look for whether: ‘the damage was the likely and foreseeable consequence of the defendant’s intentional act’;¹⁵² ‘psychiatric injury is sufficiently

¹⁴⁹ *Prinzo v Baycrest Centre for Geriatric Care* (n 70) at paras 43 and 45 per Weiler JA.

¹⁵⁰ *High Parklane Consulting Inc v Royal Group Technologies Ltd* (n 71) at para 31 per Perell J.

¹⁵¹ *ibid* at para 32 per Perell J.

¹⁵² *Austen v University of Wolverhampton* (n 132) at para 10 per Mr Justice Gray.

likely to result from the conduct complained for the defendant not to be heard to say that he did not “mean” it’;¹⁵³ the ‘consequences or potential consequences are so obvious that the perpetrator cannot realistically say that those consequences were unintended’;¹⁵⁴ or ‘those consequences [were] entirely clear and obvious’.¹⁵⁵ They may interpret the term ‘calculated’ as ‘likely to have an effect of the kind which was produced’;¹⁵⁶ or ‘of a nature which was sufficiently likely to result in such harm that an intention to produce it could be imputed to her’.¹⁵⁷ They may construe the element of ‘calculated to produce some effect’ as ‘clearly foreseeable’;¹⁵⁸ or as including the circumstance where ‘the consequences are known to be substantially certain to follow’.¹⁵⁹ Alternatively they may direct their attention towards ‘acts knowing that the consequence is substantially certain to result’;¹⁶⁰ or ‘knowing that such damage, or damage of that type, will or will almost certainly be caused’.¹⁶¹ In the light of these different expressions of knowledge-based intention, two points should be noted. A) The *degree of the likelihood* of occurrence of the consequence (side-effect), or the *degree of foreseeability* of the consequence is of key significance. In most of the authorities reviewed, a *high degree of likelihood or foreseeability* – e.g. ‘sufficient’ likelihood, ‘clear’ or ‘obvious’ foreseeability – is required. In some of them even ‘substantial certainty’ is required. B) The Restatement (Third) of Torts §1 and DCFR §VI-3:101 aside, *actual or subjective* knowledge/foresight is *not* required for such a knowledge-based intention in any of the case law studied.

On the basis of these conclusions the next question is whether, theoretically speaking, there is any convincing foundation for the inclusion of knowledge-based intention under the structure of intention. Or should we limit the concept of intention to its

¹⁵³ *C v D, SBA* (n 57) at para 99 per Mr Justice Field.

¹⁵⁴ *Rhodes v OPO* (n 16) at para 112 per Lord Neuberger.

¹⁵⁵ *ABC v WH 2000 Ltd v William Whillock* (n 142) at para 89 per Sir Robert Nelson.

¹⁵⁶ *Rhodes v OPO* (n 16) at para 36 per Lady Hale and Lord Toulson.

¹⁵⁷ *Wong v Parkside Health NHS Trust* (n 9) at para 13 per Lady Justice Hale.

¹⁵⁸ *Rahemtulla v Vanfed Credit Union* (n 144) at para 56 per McLachlin J. Also see *CVC Services v IWA-Canada, Local 1-71* (n 145) at para 80 per Lanyon; *Campbell v Wellfund Audio-Visual Ltd* (n 148) at paras 101 and 102 per Clancy J.

¹⁵⁹ *Prinzo v Baycrest Centre for Geriatric Care* (n 70) at para 45 per Weiler JA; also see *High Parklane Consulting Inc v Royal Group Technologies Ltd* (n 71) at para 32 per Perell J.

¹⁶⁰ Restatement (Third) of Torts §1 (2010) (n 40) (b).

¹⁶¹ DCFR §VI-3:101.

strictest sense, i.e., intention based upon purpose (ends or means)? And, if knowledge-based intention is to be included, should foresight with *substantial certainty* be required or should a *high degree of likelihood* suffice? In addition, the question whether *actual* knowledge/foresight on the part of the actor is indispensable will also be considered.

3.44 Reasoning for and against the inclusion of knowledge-based intention in the construct of intention

3.441 Revisiting the boundary between intention based upon ends or means and intention based upon knowledge (foresight with substantial certainty)

Before exploring whether the construct of intention can extend and include knowledge/foresight with substantial certainty (or sufficient likelihood), one preliminary issue requires to be clarified – the boundary between intention based upon ends or means and intention based upon knowledge (foresight with substantial certainty). On the face of it, the notion of ‘intention based upon ends or means’ – in particular when it is based on ‘means’ – in many situations could overlap with the idea of knowledge/foresight with substantial certainty. Where the actor deliberately harms someone as a means to achieve another purpose, due to the fact that the completion of the means is the prerequisite of the fulfilment of the ultimate end, very often the adopted means would be something *foreseen as substantially certain*.¹⁶² Under these overlapping circumstances, it seems possible for the ‘intention based upon means’ to be dealt with under the structure of intention based upon knowledge (foresight with substantial certainty). Nevertheless, the essence of latter is the knowledge or foresight of a certain ‘side-effect’ with substantial certainty. If we adhere to the interpretation

¹⁶² In *Janvier v Sweeney*, discussed above at section 3.321, the defendants’ calculation to cause terror and distress (via false statements and threats) was merely considered as the *means* to another purpose (to acquire an unlawful object). In that case, the intention to terrify can be taken as an intention based upon *ends or means*. However, when the defendants told the plaintiff the false story and threatened her to force her to cooperate, they should also have *foreseen as substantially certain* or at least as *sufficiently likely*, that their deliberate conduct would generate significant fright and distress on the part of the plaintiff.

that ‘side-effect’ denotes something lying outwith the actor’s plan or proposal,¹⁶³ the necessary means to the ultimate end should not be treated as ‘side-effect’, because the necessary means is plainly an integral part of the chosen plan or proposal. Although it might be foreseen as substantially certain to occur, it appears more warranted in theory to be placed under the framework of intention based upon *ends or means*.

3.442 Opposing and supporting views

On one view, acting knowingly cannot be taken as one’s intentional doing, unlike bringing about something as an end in itself or as a means to an end.¹⁶⁴ Intentional actions ‘involve a clear choice’ on the part of the actor.¹⁶⁵ In forming an intention, the chosen proposal is integrated into the actor’s will and stance in the world.¹⁶⁶ Provided the intention is to harm others, the actor is shaping his or her stance as one who ‘exploits’ others, using others up and ‘treat[ing] them as material’, which in a sense reveals his or her denial of others’ dignity or right.¹⁶⁷ On the other hand, if one effect is merely foreseen (even as substantially certain or sufficiently likely), but lies outside one’s original plan or proposal, neither wanted as an end nor required as a means, it will not be incorporated into the actor’s stance and will. Although in this situation the actor might know or even accept that the foreseen consequences/side-effects would be incurred by his or her deliberate conduct, the actor does not adopt or choose them. He or she might be culpable due to his or her ‘acceptance’ (of the occurrence of the foreseen consequences or side-effects), but not by virtue of his or her intention.¹⁶⁸

¹⁶³ According to Finnis, ‘side-effect’ in the relevant moral or legal sense denotes effects which ‘figure neither as end nor as means in the plan adopted by choice’. See Finnis (n 75) at 181.

¹⁶⁴ GEM Anscombe, *Intention* (2nd edn 1963, reprinted 2000) 42 and 44.

¹⁶⁵ Priel (n 35) at 188.

¹⁶⁶ Finnis (n 53) at 244.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.* The reason of the culpability should be that ‘one wrongly, e.g. unfairly, accepted them as incidents of what one did intend’.

Taking the opposite view, a foreseen consequence could be incurred ‘intentionally’ either in a *direct* sense or in an *oblique* sense.¹⁶⁹ In other words, in addition to intention in the sense of purpose (end or means), it is possible ‘to include under the term “intention” all the consequences of an act that are foreseen as certain or probable’.¹⁷⁰ In natural language, a foreseen but unwanted result is not usually deemed as *intended*,¹⁷¹ but in legal terms the (actual or constructive) foresight of consequences (or side-effects) with substantial certainty very often suffices for intention, notwithstanding that the actor might sincerely hope for them not to happen.¹⁷² This deviation between legal and natural linguistic usage should be ‘dictated by common sense’.¹⁷³ At least, in such cases we would not say that the actor conducted what he did ‘*unintentionally*’, which implies that the side-effect might not have been foreseen, or might have been brought about by accident or mistake.¹⁷⁴

As to the grounds for including the oblique and direct intention under one construct of intention, Bentham submitted that ‘consciousness’, or ‘advisedness’, ‘with respect to the circumstances, if clear from the mis-supposal of any preventive circumstance, extends the intentionality from the act to the consequences’.¹⁷⁵ Bentham’s words can be taken as suggesting that: an intention in relation to consequence(s) can be imputed where the actor deliberately engages in a certain conduct, being aware of all the circumstances and the consequence that would take place as a result of this conduct.¹⁷⁶ Furthermore, it has been argued that in situations where the consequences/side-effects have been foreseen as (substantially) certain, since they are so ‘immediately and invariably connected with’ the actor’s deliberate conduct, the suggestion that the deliberate conduct may not bring about the consequences ‘would by ordinary standards

¹⁶⁹ J Bentham, *An Introduction to the Principles of Morals and Legislation* (originally printed 1780, first published 1789, reprinted 2000) 70.

¹⁷⁰ Sidgwick (n 129) 202.

¹⁷¹ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (first published 1968, J Gardner ed, 2nd edn, 2008) 120.

¹⁷² *ibid* 119.

¹⁷³ G Williams, *The Mental Element in Crime* (1965) 15.

¹⁷⁴ Hart (n 171) 121.

¹⁷⁵ Bentham (n 169) 76 (X).

¹⁷⁶ As Bentham explained, ‘When the act itself is intentional, and with respect to the existence of all the circumstances *advised*, as also with respect to the materiality of those circumstances, in relation to a given consequence, and there is no mis-supposal with regard to any preventive circumstance, that consequence must also be intentional’. See *ibid*.

be regarded as absurd'.¹⁷⁷ Thus the actor should be held as having acted intentionally with respect to the inseparable or inevitable accompaniment of his or her conduct.¹⁷⁸ Lastly but perhaps the most importantly, both direct intention (which is based upon ends or means) and oblique intention (which is based on foresight with substantial certainty) share one feature which is of significance to 'any system of assigning responsibility for conduct'.¹⁷⁹ Namely, the actor possesses 'control over the alternative' between the occurrence or the non-occurrence of the consequence (side-effect). The actor's own choice of the course determines which consequence will be realised. The actor may be regarded as having 'chosen' the disputed consequence (side-effect), as he or she knowingly selects *the course leading to the occurrence of the consequence (side-effect) at issue*.¹⁸⁰ It is this feature (*choosing the course that would lead to the occurrence of the consequence*) which justifies the extension of the construct of intention to those situations, where there is *foresight* of substantially certain, inseparable or inevitable *consequence (side-effect)* of what is truly desired or required as a means to an end.

3.443 Concluding analysis

3.4431 'Foresight with substantial certainty' should be included in the construct of intention in relation to this tort

The argument for the inclusion of foresight with substantial certainty in the construct of intention is persuasive. The feature of having a 'choice between alternative courses leading to different consequences', or, more precisely, being able to choose the course which would inevitably lead to the occurrence of the disputed consequence, pushes the notion of 'foresight with substantial certainty' towards the concept of intention. Namely, where the consequence/side-effect is foreseen as *substantially certain*, the

¹⁷⁷ Hart (n 171) 120.

¹⁷⁸ Williams (n 173) 12-15.

¹⁷⁹ Hart (n 171) 121.

¹⁸⁰ *ibid* 121-122. In contrast, from Finnis' point of view, this at most constitutes an 'acceptance' of the occurrence of the side-effect, which is different from a 'choice' or an 'option'. See Finnis (n 53) at 244.

consequence/side-effect can be taken as inseparably or inevitably linked to the actor's deliberate conduct. Thus the actor can choose (or accept) the course which would inevitably lead to the disputed consequence, whilst he can also choose not to engage in this conduct and avoid the result. In contrast, in cases regarding recklessness and negligence,¹⁸¹ the disputed consequence or side-effect is (foreseen as) *likely* to be brought about by the actors' conduct, but also *likely* not to be caused. In other words, the consequence/side-effect may not be seen as inseparably or inevitably linked to their conduct. Therefore, whilst the actors in these kinds of cases can still decide not to engage in their conduct, or decide to comply with the standard of care, in order to avoid the occurrence of the consequences, they *cannot* choose or accept the course which would inseparably or inevitably lead to the occurrence of the consequences. In brief, it seems more warranted to place the notion of 'foresight with substantial certainty' under the head of 'intention/intentional', rather than to categorise it as 'unintentional', 'negligent', or 'reckless'.

Furthermore, as discussed above, these theories regarding consequences that are 'foreseen as (substantially) certain', 'inseparably or inevitably brought about by one's act', and 'having options, choosing or accepting the course which would inevitably lead to the occurrence of the consequence' are general principles in relation to conduct, knowledge or consciousness, and consequences. Accordingly, they should be capable of application in the field of tort. In other words, these theories can be taken as general grounds for including the idea of *foresight with substantial certainty* in the construct of intention. Yet, without doubt, in certain intentional torts what is actually required for the mental element still depends, to a great extent, upon the *character* of that individual delict. For example, the nature of intention in the economic torts may be construed rather differently as contrasted with torts concerning personal injury. With respect to the mental element of the tort of 'inducing breach of contract' and 'causing loss by unlawful means', Lord Hoffmann held in *OBG Limited v Allan* that the concept of intention in both torts requires either 'an end in itself' or 'a means to an end', explicitly excluding 'a foreseeable consequence' (of one's deliberate act);¹⁸² whilst in

¹⁸¹ The boundary between intention and recklessness, as well as the boundary between recklessness and negligence, will be analysed in the next section.

¹⁸² *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1 at paras 42, 43 and 62 per Lord Hoffmann.

relation to this tort, as observed in the above-reviewed authorities, *knowledge or foresight with substantial certainty (or high likelihood)* has been widely accepted as one of the bases of intention.

3.4432 ‘Foresight with substantial certainty’ may be regarded as the most suitable interpretation of the term ‘calculated’

In fact, in relation to this tort, the idea of *foresight with substantial certainty* may be regarded as the most suitable interpretation of the term ‘calculated’ employed in *Wilkinson v Downton*, as long as the *object* of intention in *Wilkinson* can be clarified or reformulated. The *object* of intention is closely tied to the concept of intention as well as the possible constructions of the term ‘calculated’. Based upon the authorities reviewed in this chapter, the term ‘calculated’ could be construed as ‘desired’, having the consequence as its ‘purpose’, ‘foreseeing with substantial certainty (or sufficiently high likelihood)’, or ‘foreseeing the likelihood’ of the consequence.¹⁸³ However, as analysed in section 3.22, ‘The object of intention’, if we consider the object of intention of this tort to be ‘physical harm’, these constructions may all seem implausible, because physical harm or ‘nervous shock injury’ caused by a practical joke was hardly foreseeable.¹⁸⁴ Lunney has argued that what Wright J actually had in mind was ‘calculated to cause physical *pain*’.¹⁸⁵ Given that the *object* of intention of this tort can be taken as ‘severe mental or emotional distress’ (as stated in *Rhodes v OPO*), ‘physical *pain*’, or even ‘grave effects’ (as stated in *Wilkinson v Downton*), these above-mentioned constructions would all be acceptable. Admittedly, no one knows what was actually in Downton’s mind. It may have been his *purpose* to bring about (severe) emotional distress; or perhaps he did not desire to bring about any harm, but he could be taken to have foreseen the occurrence of (severe) emotional distress as *substantially certain* or as merely *likely*.

¹⁸³ For authorities interpreting ‘calculated’ as ‘likely’, ‘foreseeing the likelihood’, or ‘reckless indifference’ see section 3.5 below.

¹⁸⁴ Réaume (n 48) 533 at 540-541.

¹⁸⁵ Lunney (n 42) at 181. Please also see the analysis in section 3.22.

A closer insight can be gained, however by examining the other words used by Wright J. First of all, although ‘calculated’ could be interpreted as ‘desired’ or having the consequence as the actor’s ‘purpose’, Wright J may not have been particularly inclined to this view, since he explicitly expressed that ‘no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant’.¹⁸⁶ Furthermore, when Wright J imputed intention, he stated that ‘[i]t is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person’.¹⁸⁷ This statement in effect reflects the ‘substantial certainty’ or the ‘foresight with substantial certainty’ of the disputed consequences. Because it is so sufficiently likely, almost certain, that grave effects would be caused, it becomes ‘difficult to imagine that such a statement...could fail’ to produce this effect. On the other hand, if Wright J merely considered the disputed consequences to be ‘likely’ to occur or ‘foreseen as likely’, he is unlikely to have used this formulation, because the term ‘likely’ implies the possibility of both the occurrence and non-occurrence of the consequences at issue. Moreover, in *Wilkinson v Downton*, Wright J imputed intention on the basis of ‘whether the defendant’s act was so plainly calculated to produce some effect of the kind which was produced’.¹⁸⁸ If ‘calculated’ is construed as ‘likely’, ‘foreseen as likely’, or ‘foreseeable’, the boundary between the imputed intention and negligence would become blurred.¹⁸⁹

In brief, where the *object* of intention can be taken as ‘severe mental or emotional distress’, ‘physical *pain*’, or even ‘grave effects’, the three constructions of ‘calculated’: 1) ‘desired’ or having the consequence as the actor’s ‘purpose’; 2) ‘foreseeing with substantial certainty’; or 3) ‘foreseeing the likelihood’ of the consequence should all be acceptable. However, the construction of ‘(foreseeing) with

¹⁸⁶ *Wilkinson v Downton* (n 1) at 59 per Wright J.

¹⁸⁷ *ibid*.

¹⁸⁸ See *ibid*.

¹⁸⁹ See also P Handford, *Tort Liability for Mental Harm* (3rd edn, 2017) paras 30.390 and 30.400.

“‘Calculated’ seems to mean something between “intended” and “foreseeably likely”...in the sense that while he had no desire to bring about the harmful consequences, they were substantially certain to follow...What is clear is that the physical harm must be more than merely foreseeable, because otherwise it will be difficult, perhaps impossible, to distinguish the *Wilkinson v Downton* principle from liability in negligence’.

substantial certainty’ is perhaps more consistent with the reasoning of Wright J’s judgment in *Wilkinson v Downton*.

3.4433 Should ‘substantial certainty’ and ‘actual foresight’ be required?

Finally, if the idea of *foresight with substantial certainty* can be accepted as one basis of intention in relation to this tort, what does this actually entail? Should the elements of ‘substantial certainty’ and ‘actual foresight’ be required for this notion? As regards the first point, in most of the authorities reviewed, a *high degree of likelihood or foreseeability* – e.g. ‘sufficient’ likelihood, ‘clear’ or ‘obvious’ foreseeability – is required, whilst ‘substantial certainty’ is required in some. Nevertheless, substantial certainty, rather than a high degree of possibility or foreseeability, should be required. The rationale for extending the concept of intention to the idea of foresight or knowledge lies in the ‘inevitability of the disputed consequence to be caused by one’s deliberate act’, as well as in the actor’s ‘having options, choosing or accepting the course which would inevitably lead to the occurrence of the consequence’. Thus the likelihood of the occurrence of the disputed consequence should be *close to certain*. Otherwise, there would be *no inevitability* and the actor would have *no option* in regard to the course which would inevitably lead to the occurrence of the consequence. Admittedly, in practice it may not be so easy to draw the boundary between ‘substantially certain’ and ‘sufficiently likely’, so it can be observed that many courts have adopted high degree of likelihood or foreseeability instead of substantial certainty. Yet, noticeably, even in some cases where the court merely required a high degree of likelihood or foreseeability, other wordings employed there could nonetheless be construed as requiring the likelihood or foreseeability to be *as high as to be almost certain*. For example, in *Wong v Parkside Health NHS Trust*, it was held that the ‘degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not “mean” it to do so’;¹⁹⁰ in *C v D, SBA*, Mr Justice Field said that ‘psychiatric injury is *sufficiently likely* to result from the conduct complained for the

¹⁹⁰ *Wong v Parkside Health NHS Trust* (n 9) at para 12 per Lady Justice Hale.

defendant not to be heard to say that he did not “mean” it’;¹⁹¹ in *Rhodes v OPO* and *ABC v WH 2000 Ltd v William Whillock*, it was held that the ‘consequences or potential consequences are so obvious that the perpetrator cannot realistically say that those consequences were unintended’.¹⁹² Formulations such as ‘cannot be heard to say that he did not “mean” it’, similar to ‘difficult to imagine that such a statement...could fail’ as employed in *Wilkinson*, simply reflect the *substantial certainty* of the disputed consequence. If the consequence was *not* foreseen as *almost certain* to follow, or, in other words, if there was still some possibility that the consequence would *not* occur, there is no reason why the actor ‘cannot be heard to say that he did not “mean” it’. Notwithstanding references to a requirement for a high degree of likelihood or foreseeability therefore discussion elsewhere in these cases reflects a need for ‘substantial certainty’.

The second point is whether ‘actual foresight’ should be required, given that the notion of *foresight with substantial certainty* can be accepted as one basis of intention in relation to this tort. As discussed, if the ground for the concept of intention to extend to *foresight with substantial certainty* lies in the actor’s ‘having options, choosing or accepting the course which would inevitably lead to the occurrence of the consequence’, *actual foresight* should be an indispensable element in theory. However, the requirement of *actual* or *subjective* foresight may not work in practice. The proof can be found in the case law discussed above. In none of these cases was *actual or subjective* knowledge/foresight a categorical requirement (for imputing intention). The underlying reason may be that, in practice, the boundary between ‘actual foresight’, ‘inferred/constructive foresight’, and ‘foreseeability’ (what can be foreseen objectively by ordinary and reasonable people) appears unclear. Due to the impossibility of looking into the defendant’s mind, in most cases the *actual* intention/foresight must be inferred from the defendant’s conduct and surrounding context. In addition, the inference of intention/foresight may take into account ‘foreseeability’ (whether the disputed consequence can be foreseen objectively by ordinary and reasonable people). Where direct evidence (e.g. the actor’s own

¹⁹¹ *C v D, SBA* (n 57) at para 99 per Mr Justice Field.

¹⁹² *Rhodes v OPO* (n 16) at para 112 per Lord Neuberger. Also see *ABC v WH 2000 Ltd v William Whillock* (n 142) at para 89 per Sir Robert Nelson.

statements) is absent, it is virtually impossible for courts to ascertain an actor's knowledge or foresight without looking also at the actor's conduct, the surrounding context, as well as the test of foreseeability. Therefore, it seems unavoidable that in practice most courts would adopt the notion of *constructive* knowledge/foresight, *foreseeability*, or *objective likelihood*, rather than categorically require *actual* or *subjective* knowledge/foresight. In sum, *constructive* knowledge or foresight should be accepted along with *actual* knowledge or foresight.

3.5 Recklessness

3.51 Basic definition

The notion of recklessness denotes a frame of mind which is usually bracketed with intention.¹⁹³ Recklessness, in its core sense, is a mental state in which people engage in conduct deliberately, having foreseen the possible consequences or risks of their actions but nonetheless going ahead, without any definite purpose or desire to bring the consequences about or to actualise the risks.¹⁹⁴ As they have foreseen, in an actual or constructive manner, the consequences/risks of their conducts, but still opt to engage in them regardless, their indifference to the consequences/risks is disclosed. However, following a deliberate course of conduct and tolerating the risks would not in a straightforward way suffice for recklessness,¹⁹⁵ as in this modern world risks are inherent in almost every kind of conduct. To be taken as recklessness, the risks that are run require to be unreasonable and unbalanced.¹⁹⁶ According to the Restatement (Third) of Torts §2, such unreasonableness or imbalance may be found when the magnitude of the foreseen risks are disproportionately greater compared to the burden of precaution. The greater the imbalance, the more likely it is that the actor's conduct

¹⁹³ Deakin, Johnston and Markesinis (n 40) 27. In some torts/delicts recklessness is taken as meeting the requirement of intention. See Walker (n 53) 43; Cane (n 35) at 535-536.

¹⁹⁴ With regard to the definition of recklessness, see Cane (n 35) at 535; Walker (n 53) 43; Deakin, Johnston and Markesinis (n 40) 27; JF Clerk and AM Dugdale, *Clerk & Lindsell on Torts* (22nd edn, 2018) paras 1-61 and 1-64.

¹⁹⁵ Restatement (Third) of Torts §2 (2010) Comment d.

¹⁹⁶ See Cane (n 35) at 535. Also see Restatement (Third) of Torts §2 (2010) (n 195) Comment d.

would be held to be reckless.¹⁹⁷ Recklessness (or a reckless act) has been defined in the Restatement (Third) of Torts §2 as applying where ‘(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk’.

3.52 Case law and analysis

3.521 Case law

The Court of Appeal in *Wainwright v Home Office* interpreted the term ‘wilfully done’, as adopted in *Wilkinson v Downton*, as denoting an act which is either ‘done with the intention of causing harm’ or ‘done in circumstances where it was so likely that the harm would be incurred that an intention to produce harm has to be imputed’.¹⁹⁸ It was emphasised that ‘[c]ertainly nothing less than recklessness would do’¹⁹⁹ as well as that ‘[t]he limiting factor to the “tort” is the intention to cause harm which harm is in fact then caused or recklessness as to whether that harm would be caused’.²⁰⁰ In the House of Lords, Lord Hoffmann agreed that the necessary intention was not established in this case.²⁰¹ Nevertheless, in respect of the intention needed for mere distress potentially to be actionable,²⁰² he observed that the defendant must have conducted himself in a manner that the defendant ‘knew to be unjustifiable and intended to cause harm, or at least acted without caring whether he caused harm or not’.²⁰³ These decisions point to recklessness playing a similar or equivalent role to that of intention, despite its being differentiated from intention.

¹⁹⁷ Restatement (Third) of Torts §2 (2010) (n 195) Comment d.

¹⁹⁸ *Wainwright v Home Office* [2001] EWCA Civ 2081 at para 44 per Lord Woolf CJ.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid* at para 49 per Lord Woolf CJ.

²⁰¹ *Wainwright v Home Office* (n 12) at para 47 per Lord Hoffmann.

²⁰² Notably, regarding the question as to whether intentionally inflicted distress can be recoverable, Lord Hoffmann reserved his opinion. See *ibid* at para 46 per Lord Hoffmann.

²⁰³ *ibid* at para 45 per Lord Hoffmann.

In *Austen v University of Wolverhampton*, it was held that in establishing the existence of intention, it is sufficient for the claimant to show the damage was the ‘likely and foreseeable consequence’ of the defendant’s deliberate conduct.²⁰⁴ This appears to suggest that, evidentially speaking, proving the existence of the actor’s recklessness is sufficient for the finding of intention.

In *C v D, SBA*, there were said to be three different ways in which intention might be imputed. The first was conduct ‘*calculated to cause psychiatric harm*’; the second was conduct from which ‘*psychiatric injury is sufficiently likely to result*’; and the third was where the defendant was ‘*reckless as to whether he caused psychiatric harm*’.²⁰⁵ And Field J held in this case that psychiatric injury to the claimant ‘was not sufficiently likely for the necessary intention to cause harm to be imputed on the first two bases of imputation. However, I am satisfied that [the defendant]...was reckless as to whether he caused psychiatric injury to C...’.²⁰⁶ Therefore, the defendant was held liable on the basis of the principle of *Wilkinson v Downtown*.²⁰⁷ Clearly the presence of recklessness was, in this decision, taken as having met the required mental element of the *Wilkinson* tort.

There are also cases from Canada and from Australia in relation to this tort, where the intention or calculation on the part of the defendant can be construed as encompassing recklessness or reckless indifference. In *Butler v Newfoundland (Workers’ Compensation Commission)*, a Canadian case, when analysing the claims based upon ‘intentional infliction of mental suffering’, Russell J found (imputed) the ‘requisite intention’ on the basis of a ‘reckless disregard as to whether or not mental suffering would ensue from these acts’.²⁰⁸ Moreover, in an Australian case, *Carrier v Bonham*, whilst dissecting the *Wilkinson* tort, McPherson JA defined the term ‘calculated’ as

²⁰⁴ *Austen v University of Wolverhampton* (n 132) at para 10 per Mr Justice Gray.

²⁰⁵ *C v D, SBA* (n 57) at para 99 per Mr Justice Field.

²⁰⁶ *ibid* at para 100 per Mr Justice Field.

²⁰⁷ Liable ‘for the psychiatric injury caused by his conduct on the first occasion in the infirmary’. See *ibid*.

²⁰⁸ *Butler v Newfoundland (Workers’ Compensation Commission)* [1998] NJ No 190 at para 104 per Russell J.

either ‘subjectively contemplated and intended’ or ‘objectively likely to happen’.²⁰⁹ Following this decision, in *Nationwide News Pty Ltd v Naidu*, Spigelman CJ advised that the expression of ‘calculated’ can be construed as a ‘subjective, actual, conscious desire to bring about a specific result’, or ‘what is likely, perhaps overwhelmingly likely, to occur considered objectively’, even including ‘reckless indifference to a result’.²¹⁰ In *JMD v GJH*, also an Australian case, Davis DCJ adopted the criteria derived from *Wilkinson v Downton* and held the defendant liable, on the basis of that either ‘the defendant wilfully committed a series of acts calculated to cause the plaintiff harm’, or at least demonstrated a ‘reckless indifference’ to the result, since the defendant’s conduct was ‘objectively likely to cause harm’.²¹¹ Following this thread, when Rothman J proposed the requisite elements of the *Wilkinson* tort in *Clavel v Savage*, he included ‘reckless indifference’ in the element of ‘intention to cause physical or psychiatric harm’.²¹²

By contrast, in the two well-known Canadian cases reviewed above, *Prinzo v Baycrest Centre for Geriatric Care* and *High Parklane Consulting Inc v Royal Group Technologies Ltd*, when the court examined the prerequisites of the *Wilkinson* tort, the requirement of ‘calculated to produce harm’ was held as being met where ‘the actor desires to produce the consequences that follow from the act’ or where ‘the consequences are known to be substantially certain to follow’.²¹³ It appears therefore that the notion of ‘recklessness’ or ‘reckless indifference’ is not regarded as one form of ‘calculation’. Noticeably, in *Rhodes v OPO*, although the majority interpreted the term ‘calculated’ as ‘likely to have an effect of the kind which was produced’,²¹⁴ they did not take an expansive approach when reformulating the mental element of this tort. Namely, they expressly decided ‘not to include recklessness in the definition of the mental element’, because recklessness was not ‘a term used in *Wilkinson v Downton*

²⁰⁹ *Carrier v Bonham* (n 73) at para 25 per McPherson JA.

²¹⁰ *Nationwide News Pty Ltd v Naidu* (n 74) at paras 77 and 80 per Spigelman CJ; or at para 376 per Basten JA.

²¹¹ *JMD v GJH* [2012] WADC 124 at paras 100-103 per Davis DCJ.

²¹² *Clavel v Savage* [2013] NSWSC 775 at para 36 per Rothman J.

²¹³ *Prinzo v Baycrest Centre for Geriatric Care* (n 70) at paras 43 and 45 per Weiler JA; *High Parklane Consulting Inc v Royal Group Technologies Ltd* (n 71) at paras 31 and 32 per Perell J.

²¹⁴ *Rhodes v OPO* (n 16) at para 36 per Lady Hale and Lord Toulson.

or *Janvier v Sweeney*, and it might generate ‘problems of definition’.²¹⁵ This stance has been followed in *Brayshaw v Partners of Apsley Surgery & O’Brien*, which is a case involving psychiatric harm (on the part of the claimant) caused by virtue of ‘religious practices and religious doctrines imposed on her’ through a ‘locum doctor’.²¹⁶ When considering the claim on the basis of the *Wilkinson* tort, or ‘the tort of inflicting intentional harm’, Mr Justice Spencer regarded the defendant as having no ‘requisite intention to cause harm’, and therefore dismissed this claim.²¹⁷ Notably, before he struck out this claim, he reaffirmed the three elements reformulated in *Rhodes v OPO*, stating that ‘recklessness is insufficient’²¹⁸ (for the mental element to be met).

3.522 A brief summary of the case law

These decisions indicate that many of the *Wilkinson* authorities, in England and beyond, recognised or accepted that the umbrella of intention can extend to the notion of recklessness, or at least that reckless conduct should be treated alongside intentional conduct. In contrast, there are also cases where recklessness was considered to be incapable of constituting the level of ‘calculation’ or ‘intention’ required in this tort; nor, in these cases, was recklessness deemed as equivalent to intention. On the other hand, the Restatement (Third) of Torts puts recklessness in a position distinct from intention,²¹⁹ but makes both relevant to the same rule in relation to the specific tort of ‘Infliction of Emotional Harm’.²²⁰ In the final section of this chapter, the issues of whether recklessness can be incorporated into the structure of intention, or whether reckless conduct should be attached with the same legal effect (or liability) as intentional, will be further discussed. Prior to that discussion, in order to clarify the

²¹⁵ *ibid* at para 87 per Lady Hale and Lord Toulson.

²¹⁶ *Brayshaw v Partners of Apsley Surgery & O’Brien* [2018] EWHC 3286 (QB) at para 2 per Mr Justice Spencer.

²¹⁷ *ibid* at para 58 per Mr Justice Spencer.

²¹⁸ *ibid* at para 56 per Mr Justice Spencer.

²¹⁹ See Restatement (Third) of Torts §1 (2010) (n 40); Restatement (Third) of Torts §2 (2010) (n 195).

²²⁰ Restatement (Third) of Torts §46 (2012) (n 122).

essence of recklessness, it is necessary to explore the boundary between intention and recklessness, as well as the boundary between recklessness and negligence.

3.53 The boundary between intention and recklessness

Prior to distinguishing intention from recklessness, what the two notions have in common should be mentioned. An intentional tort/delict always begins with a deliberate act. This feature is shared by reckless conduct, which denotes the actor's deliberate engagement in an unreasonable/unbalanced risk-taking act. However, this similarity may not be so remarkable, as a deliberate act is also a shared feature in many negligence cases. In contrast, where the focus is placed on the mental state *in relation to the incurred consequence*, recklessness is more readily distinguished from intention. First of all, where intention is based upon purpose (ends or means), bringing about the consequence at issue should be an end in itself (the ultimate purpose of the actor's original plan), or at least a necessary condition to his or her ultimate purpose.²²¹ On the other hand, in the mind-set of a reckless actor, the consequence incurred is not something that he or she has as a purpose or plans to bring about. Rather, it is merely a side-effect or by-product foreseen by him while he deliberately engages in his original plan.

As to the borderline between the mental states of *intention based upon knowledge* (foresight with substantial certainty of the consequence) and *recklessness*, the degree of likelihood of the occurrence of consequence is highly important. *Foresight (in an actual or constructive manner) of the side-effect but still deliberately engaging in the original plan* is a shared character of both of them. However, for intention based upon knowledge the perceived degree of likelihood of the occurrence of consequence should be 'certainty' or 'close to certainty', whilst for recklessness mere possibility or probability suffices. This distinction has been unequivocally adopted in the wordings

²²¹ See previous section 3.321 regarding intention based upon ends or means.

of Restatement (Third) of Torts §1 and §2,²²² which seems to be warranted and can be explained as follows.

As discussed in the previous section, the extension of the construct of intention to cover intention based upon knowledge, in the sense of foresight with substantial certainty of the consequence (side-effect), can be justified by the *inseparable or inevitable link between the deliberate conduct and the foreseen consequence* and the actor's *choosing the course which would inevitably lead to the occurrence of the disputed consequence*.²²³ The inseparability or inevitability between the deliberate conduct and the foreseen consequence lies in the fact that, pursuant to common sense, the consequence (side-effect) is foreseen as a *substantially certain* accompaniment of the deliberate conduct. There is no way that the actor can complete his conduct without also bringing about the consequence. And as the consequence is foreseen as substantially certain and inevitable in common sense terms, the actor should be taken as *having a choice* between the occurrence and the non-occurrence of the result. In other words, the element of *substantial certainty* is closely tied to 'inevitability', 'options of different courses' and 'choice (or acceptance)'. The feature of 'choice' displays the actor's personality, and thus assimilates him/her to an actor with *intention*. In contrast, in cases where the consequence is merely foreseen as possible or probable rather than as substantially or almost certain (to happen), no one can be sure of its occurrence or non-occurrence. There exists *no* 'inseparability' or 'inevitability' between the deliberate conduct and the consequence that actually results. Since the actor *does not have a choice* between the occurrence and the non-occurrence of the consequence, he/she cannot be taken as having made a 'choice' (in relation to the resulted consequence). Therefore, despite having foreseen the risks, the actor's conduct could at most be deemed as 'risk-taking' instead of 'intentional'.

It is thus clear that the degree of likelihood of the occurrence of consequence determines the nature of the conduct – either having a choice between the occurrence and the non-occurrence of the consequence, or mere risk-taking. And it is this

²²² Restatement (Third) of Torts §1 (2010) (n 40); Restatement (Third) of Torts §2 (2010) (n 195).

²²³ See section 3.4431.

distinctive nature of having a ‘choice (between different results)’ or ‘risk-taking’ which differentiates intention from recklessness, and pushes the notion of ‘foresight with substantial certainty’ towards intention rather than recklessness.

Although this distinction is useful, it should be reiterated that some courts have chosen to employ terms such as ‘sufficiently likely’, ‘clearly foreseeable’, or ‘so likely’, instead of ‘foreseen as substantially certain’.²²⁴ The underlying reason might be that in the modern industrialised world the borderline between ‘certain’ and ‘sufficiently likely’ (or ‘clearly foreseeable’) is difficult to draw,²²⁵ and it is increasingly rare that the occurrence or non-occurrence of a result can be guaranteed as absolutely ‘certain’. Thus the adoption of the terms (‘sufficiently likely’, ‘clearly foreseeable’, or ‘so likely’) could in some cases add room for manoeuvre. However, this looser approach may blur the boundary between foresight with substantial certainty and recklessness, obscuring the definitions of intention and recklessness, since it avoids the distinction between having a ‘choice (between the occurrence and the non-occurrence of the consequence)’ and ‘risk-taking’. In order to maintain the boundary between intention and recklessness, despite practical difficulties, the element of ‘substantial certainty’ should still be required when establishing an intention (based upon knowledge).²²⁶

3.54 The boundary between recklessness and negligence

Though from a legal perspective recklessness can be deemed as occupying an intermediate position between intention and negligence, for the non-lawyer the notion of recklessness may be closer to negligence, as the literal distinction between recklessness and negligence seems unclear. In ordinary language, the term *recklessness* appears synonymous with *carelessness*, and *carelessness* can be

²²⁴ See sections 3.42 and 3.4433.

²²⁵ According to Finnis, the distinction drawn between ‘highly probable’ and ‘virtually certain’ consequences can be ‘tenuous and artificial’. See Finnis (n 75) at 184; also see Duff (n 89) 96.

²²⁶ It can be observed that, although certain decisions have required only a high degree of likelihood or foreseeability, other wordings employed in these cases nonetheless reflect the sense of ‘substantial certainty’. See section 3.4433.

employed for (*inadvertent*) *negligence*.²²⁷ These definitional complexities are likewise to be discerned in Cane's words, which depict negligence as 'failure to take reasonable care to avoid causing harm to others',²²⁸ and recklessness as 'failure to care, as the normal person would, about the risk that others may suffer harm as a result of one's conduct'.²²⁹ In Cane's analysis, it appears that the *non-compliance with some sort of standard of conduct* should be the shared token of negligence and recklessness; or, in other words, both indicate the breach of some kind of duty, either the duty to take care or the duty to care. In addition, in both circumstances, exercising a balance or examining the element of reasonableness would be of importance.²³⁰ Usually the unreasonableness or imbalance in cases regarding recklessness would be greater than that observed in ordinary negligence cases.²³¹

Despite certain parallels between negligence and recklessness, there may exist important points of difference. If we take a closer look at Cane's words and compare the 'failure to take reasonable care' with 'failure to care', we might gain some sense that the latter is indicative of the actor's awareness of the risks but lack of care about them; the former implies not paying attention or not taking precautions, where the actor's knowledge or unawareness is not of great significance. This view is close to the position adopted by the Restatement (Third) of Torts §2 and §3. According to the Restatement (Third) of Torts §3, negligence is defined as 'not exercis[ing] reasonable

²²⁷ Williams (n 173) 55. It is also stated that 'carelessness assumes the legal quality of negligence' in *Donoghue v Stevenson* 1932 SC (HL) 31 at 70 per Lord Macmillan: '[t]he law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence, and entails the consequences in law of negligence.'

²²⁸ Cane (n 35) at 537.

²²⁹ *ibid.*

²³⁰ As mentioned, mere risk-taking cannot directly be equated with recklessness. There must be some unreasonableness or imbalance in the conduct or in the relation between the conduct and the incurred risks or consequence. With regard to negligence, the scope of duty is determined by reference to: 'foreseeability', 'a relationship of proximity', and the principle of 'fair, just and reasonable'. See *Donoghue v Stevenson* (n 227); *Caparo Industries Plc v Dickman* [1990] 2 AC 605. On the other side of the Atlantic, the American Restatement (Third) of Torts §3 defines negligence as 'not exercis[ing] reasonable care'. As to what can be taken as the absence of reasonable care, three major elements should be considered: 1) the 'foreseeable likelihood' of the conduct resulting in harm, 2) 'foreseeable severity' of the ensuing harm, and 3) the 'burden of precautions'. The fundamental theory in ascertaining negligence is to balance the risks against the benefits. Whilst the former represents the possible harm engendered by the wrongdoer's act, the latter is the advantages obtained by the wrongdoer when the precautions are omitted or refrained. See Restatement (Third) of Torts §3 (2010) Comments d and e.

²³¹ Restatement (Third) of Torts §2 (2010) (n 195) Comment d.

care under all the circumstances’,²³² and ‘it is the person’s failure to appreciate the risk that mainly constitutes the person’s departure from reasonable care’.²³³ In other words, in many negligence cases, the actors may not have *actually* known or foreseen the risks at issue,²³⁴ though this *subjective absence of awareness* of risks has not been assumed as a precondition of negligence.²³⁵ As the actor’s mental state is rarely the focus of negligence,²³⁶ the law concerns more about the (actor’s) failure to conform to a certain standard of conduct specified in law. Opposite to this, as ‘unreasonable risk-taking’ properly depicts the nature of reckless conduct, theoretically speaking the actor’s having *actually* known or foreseen the risks should be a necessary condition to be met prior to the finding of recklessness.²³⁷

Although some differences between recklessness and negligence can be observed in respect of ‘actual knowledge/foresight of the risks’, the boundary between them is far from clear. As mentioned, there is no assumption that a negligent actor must have failed to advert to the risk.²³⁸ In other words, in many cases negligent actors may have *actually* known or foreseen the risks, as do reckless actors. More importantly, the borderline between *actual* knowledge/foresight and *constructive* knowledge/foresight (or even foreseeability) is significantly blurred, and the requirement of *actual* or *subjective* knowledge/foresight may not work in practice. As analysed in the previous section,²³⁹ in order to reach a judgment as regards the *actual* knowledge of risks on the part of the actor, it seems inevitable that we must resort to the actor’s conduct or the contextual circumstances,²⁴⁰ or appeal to another judgment as to whether a reasonable person in the position of the actor would have foreseen the risks. And this question is

²³² Restatement (Third) of Torts §3 (2010) (n 230).

²³³ Restatement (Third) of Torts §2 (2010) (n 195) Comment c.

²³⁴ ‘In a significant number of cases, however, the actor’s alleged negligence consists of an inattentive failure to perceive or appreciate the risk involved in the actor’s conduct.’ See Restatement (Third) of Torts §3 (2010) (n 230) Comment k.

²³⁵ *ibid.*

²³⁶ See Cane (n 35) at 537, ‘[s]ince tortious negligence involves no mental state...’.

²³⁷ Recklessness does require the actual knowledge of risks or of the relevant facts which would render the risks obvious to other people in the wrongdoer’s situation. See Restatement (Third) of Torts §2 (2010) (n 195) Comment c.

²³⁸ Restatement (Third) of Torts §3 (2010) (n 230) Comment k.

²³⁹ See section 3.4433.

²⁴⁰ For example, it is commented in the Restatement that the ‘obviousness of the danger’ could serve to underpin ‘an inference of the person’s knowledge’, or ‘a finding of recklessness’. See Restatement (Third) of Torts §2 (2010) (n 195) Comment c.

not too much different from asking whether a certain occurrence ‘may reasonably and probably be anticipated’ to ensue provided that ‘the duty is not observed’²⁴¹ – the formula of foreseeability in cases of negligence. In brief, the feature of ‘actual knowledge/foresight’ may not serve adequately to distinguish recklessness from negligence. Also, in cases regarding recklessness, *constructive* knowledge or foresight (of risks) should be accepted along with *actual* knowledge or foresight.

3.6 The appropriate mental element for this tort

3.61 Fundamental considerations

From the discussion above, three possibilities are to be considered when constituting the appropriate mental element for this tort/delict: 1) intention based upon purpose (ends or means); 2) intention based on knowledge (or foresight with substantial certainty); 3) recklessness. In considering which should be selected, the prime consideration is the function that mental state serves for this specific tort/delict. To this end the structure and prerequisites of both intentionally and negligently inflicted mental harm in two different models might usefully be considered: the Restatement (Third) of Torts and the Scottish Law Commission Report on *Damages for Psychiatric Injury*. The judgments in *Rhodes v OPO* will also be taken into account, in order to clarify the object and the role of this mental element.

3.62 The structure of Restatement (Third) of Torts §46 and §47

The Restatement (Third) of Torts §46 provides the basis of liability for ‘non-negligently’ incurred emotional harm, in accordance with which ‘[a]n actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional

²⁴¹ *Bourhill v Young* 1942 SC (HL) 78 at 88 per Lord Macmillan.

harm causes bodily harm, also for the bodily harm'.²⁴² It can be observed from the text that the mental state stipulated here includes intention and recklessness, and according to the Restatement (Third) of Torts §1, the former denotes either the intention based upon purpose or the intention based upon foresight with substantial certainty.²⁴³ It is also clear from the text that the *object* of the mental state should be 'severe emotional harm'; namely, the conduct of the actor is seen as intentional or reckless *in relation to* the 'severe emotional harm'. Compared to this, the Restatement (Third) of Torts §47 provides for liability for negligently caused emotional harm arising from two situations: liability can only be attached in circumstances where the negligent conduct '(a) places the other in danger of immediate bodily harm and the emotional harm results from the danger'; or '(b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm'.²⁴⁴ Herein the *object* of the negligence or the negligent act is 'serious emotional harm'.²⁴⁵

3.63 Conclusions drawn from Restatement (Third) of Torts §46 and §47

What light is shed from the review of Restatement (Third) of Torts §46 and §47? Firstly, §46 takes an expansive position with regard to the scienter element of this wrong, incorporating recklessness along with intention. Secondly, in addition to the mental element, under §46, the wrongdoer's conduct must be extreme and outrageous, which can be taken as the 'central' requirement of this tort²⁴⁶ and is difficult to satisfy.²⁴⁷ Furthermore, in terms of the threshold for severity of harm, §46 asks for *severe emotional harm*, whilst §47 requires *serious emotional harm*, and the threshold of severe emotional harm seems to be higher than that of serious emotional harm, or at least equivalent to it.²⁴⁸ Fourthly, §46 and §47 appear to be related but distinctive

²⁴² Restatement (Third) of Torts §46 (2012) (n 122).

²⁴³ Restatement (Third) of Torts §1 (2010) (n 40).

²⁴⁴ Restatement (Third) of Torts §47 (2012).

²⁴⁵ *ibid.*

²⁴⁶ Restatement (Third) of Torts §46 (2012) (n 122) Reporters' Note on Comment h.

²⁴⁷ The 'extreme and outrageous' conduct should be an act going 'beyond the bounds of human decency' and 'regarded as intolerable in a civilised community'. See *ibid* Comment d.

²⁴⁸ *ibid* Comment j and Reporters' Note on Comment j.

wrongs, as their requirements of mental state, thresholds of harm, and other prerequisites are differently stated. If the plaintiff cannot establish liability under §46, in order to obtain compensation pursuant to §47, other independent legal obstacles must be surmounted apart from substantiation of elements of negligence – such as the two circumstantial conditions stipulated in §47.²⁴⁹

In the light of these four points, it is arguable that *the scienter element of Restatement (Third) of Torts §46 does not play a significant and differentiating role in this wrong.*²⁵⁰ Though the culpability of the actor in terms of §46 may be graver than that in terms of §47, the threshold of harm in the former is higher than or identical with that in the latter.²⁵¹ Despite there being no need for the plaintiff to substantiate (either of) the two circumstances required in §47, the onus of proving ‘extreme and outrageous conduct’ in §46 is sufficiently burdensome. In other words, the existence of these heavy legal burdens lessens the role that a more culpable mental state could otherwise have played, rendering it unimportant. This assumption in a sense justifies why the scienter element of §46 can be so expansive. If a certain (scienter) element serves a great function or bring about great changes – e.g. the ‘independent’ or ‘ancillary’ function in Cane’s words,²⁵² in order to preserve stability and fairness of law, it should be precisely circumscribed. Namely, this (scienter) element should be clearly even strictly defined given that it could make alterations or grant recovery which otherwise would not have been admitted by law,²⁵³ as ‘more extensive recovery for loss suffered is justified by the more stringent criteria to be satisfied before imposing liability’²⁵⁴ or ‘[a] high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not

²⁴⁹ ‘[A] person who cannot recover for intentional infliction of emotional harm usually faces substantial obstacles to recovering on a negligence theory’. See *ibid* Comment h.

²⁵⁰ In fact this assumption has been expressly admitted by the Reporters of the Restatement, please see *ibid* Reporters’ Note on Comment h.

²⁵¹ Certainly, when comparing the threshold of harm, in addition to culpability, the prerequisites of Restatement (Third) of Torts §47 should also be taken into account. For instance, under the situation (a) of §47, a threat to physical safety (‘immediate bodily harm’) has been imposed upon the claimant. See Restatement (Third) of Torts §47 (2012) (n 244).

²⁵² See the analysis in section 3.65.

²⁵³ Stilitz and Sales (n 53) at 430.

²⁵⁴ *ibid* at 436.

actionable by the claimant against the defendant'.²⁵⁵ On the other hand, if the presence of the scienter element of §46 does not alleviate any other heavy onus required in §46, it could be more expansive. Or, at least, its being expansive would be less problematic. And the Restatement (Third) of Torts §46 is indeed framed in this manner, the scienter element of which is so expansive and the borderline between it and negligence is so unclear.²⁵⁶

3.64 The proposals from the Scottish Law Commission

The Scottish Law Commission's Report on *Damages for Psychiatric Injury*²⁵⁷ will be briefly considered here. The draft Bill contained in the Report was not in the end taken up,²⁵⁸ but the legal framework suggested is significantly different from that contained in the Restatement (Third) of Torts §46 and §47, and merits analysis. The SLC Report advocated legislation to replace the existing legal rules pertinent to recovery of damages for psychiatric injury.²⁵⁹ The proposed Bill employed the term 'mental harm' as the 'generic term', covering any harm done to a person's 'mental state, mental functioning or well-being'.²⁶⁰ And the general restrictions contained in the statutory scheme precluded recovery in circumstances where 'the mental harm results from the normal stresses or vicissitudes of life or the life that the victim leads'; or 'from bereavements or other losses of a type which a person can reasonably expect to suffer in the course of his or her life'.²⁶¹ In other words, only mental harm resulting from abnormal conditions of life or from losses not generally expected in life was potentially eligible for compensation.

²⁵⁵ *OBG Ltd v Allan* (n 182) at para 166 per Lord Nicholls of Birkenhead.

²⁵⁶ As regards the boundary between recklessness and negligence, please refer to the analyses in section 3.54.

²⁵⁷ Scottish Law Commission, *Damages for Psychiatric Injury* (Scot Law Com No 196, 2004). This report will be referred to as SLC Report in the following discussions.

²⁵⁸ The report was reviewed as part of a Scottish Government consultation in 2013, see <http://www.gov.scot/Publications/2013/08/6983>. As to the grounds provided by the Scottish Government, as well as further comments on this report, please refer to Chapter 4, the first footnote.

²⁵⁹ Scottish Law Commission (n 257) paras 3.3 and 3.4.

²⁶⁰ *ibid* para 3.8.

²⁶¹ *ibid* paras 3.22 and 3.27.

Apart from these general restrictions, where mental harm was not caused intentionally, the Scottish Law Commission recommended that the liability should not be imposed ‘unless the mental harm amounts to a medically recognised mental disorder’,²⁶² encompassing both ‘psychological as well as psychiatric disorders’.²⁶³ By contrast, in cases of intentional wrongdoing, the defender was to be held responsible for all of the intended mental harm, including ‘distress, anxiety, grief, anger etc’, which need not amount to a ‘medically recognised mental disorder’.²⁶⁴ The Scottish Law Commission was of the opinion that this differentiation between unintentional and intentional liability was compatible with the distinct manners in which the law of delict treated these two different categories of wrongful conduct.²⁶⁵ However, it provided no clear definition on what constitutes the concept of intention.

In addition, in regard to foreseeability,²⁶⁶ the Scottish Law Commission proposed that ‘the reasonable foreseeability test should apply in relation to unintentionally caused mental harm although there will be no liability unless the reasonably foreseeable mental harm amounts to a medically recognised mental disorder’.²⁶⁷ This might be taken to mean that, conversely, where mental harm is incurred by intentional conduct, the foreseeability test should not apply.²⁶⁸ The Scottish Law Commission did not clarify why the test of foreseeability was not applicable to intentionally inflicted mental harm. A possible reason might be that, in most of the cases, *intended* mental harm is the *foreseen* or *foreseeable* mental harm. Nevertheless, there are situations where the *actually caused* mental harm (e.g. recognised psychiatric illness) would be more serious than the *intended or foreseen (foreseeable)* mental harm (e.g. mere distress or significant emotional distress). In these situations, whether or not the test

²⁶² *ibid* paras 3.7 and 3.9.

²⁶³ *ibid* para 3.9.

²⁶⁴ *ibid* para 3.7.

²⁶⁵ *ibid* paras 3.7 and 3.31.

²⁶⁶ According to the report, the foreseeability issue is whether or not ‘a person foresaw, or could reasonably have foreseen, at the time of the act causing the harm, that the act was likely to cause a person in the position of the victim to suffer such harm’. See *ibid* para 3.44.

²⁶⁷ *ibid* para 3.32 (b).

²⁶⁸ Also see *ibid* para 3.34. ‘Although this provision is primarily concerned with negligence, it is intended to apply in all situations where the defender did not intend to cause the victim mental harm.’

of foreseeability applies will make a difference. This point is further addressed as follows.

3.65 The role and the construct of intention based on the SLC Report

The SLC Report distinguished intentionally and negligently inflicted mental harm, but it applied the same general restriction to both.²⁶⁹ This approach in a sense differs from the models of Restatement (Third) of Torts §46 and §47, where distinct requirements have been set for intentionally and negligently inflicted emotional harm, as highlighted above. In the SLC framework, if the circumstances of the case did not come within the general restriction – in other words, the harm was such that ‘[a] person should reasonably be expected to endure [it] without seeking reparation’,²⁷⁰ then recovery might potentially be available. If the mental harm of the victim was caused by negligence, in addition to satisfying the preconditions to establish negligence, it was necessary to prove that the mental harm constituted ‘medically recognised mental disorder’.²⁷¹ However, if intention was established that threshold did not have to be met,²⁷² and lesser mental harm, including ‘distress’, ‘anxiety’, ‘grief’, or ‘anger’, might qualify for compensation.²⁷³ Furthermore, where intention to cause mental harm was established, the SLC appeared to indicate that the foreseeability test would no longer apply, suggesting that compensation might be payable even for unforeseeable mental harm.²⁷⁴ Therefore in contrast with the Restatement (Third) of Torts, *the presence of intention played a significant role* in the framework proposed by the SLC Report.

²⁶⁹ As analysed, the general restrictions in relation to recovery apply to the situations where ‘the mental harm results from the normal stresses or vicissitudes of life or the life that the victim leads’; or ‘from bereavements or other losses of a type which a person can reasonably expect to suffer in the course of his or her life’. See *ibid* paras 3.22, 3.27 and 3.30.

²⁷⁰ *ibid* para 3.30.

²⁷¹ *ibid* para 3.9.

²⁷² *ibid* para 3.7.

²⁷³ Without doubt, the above-mentioned general restrictions still apply here.

²⁷⁴ Scottish Law Commission (n 257) para 3.32 (b).

According to Cane, the functions or roles of tortious intention can be roughly divided into two sorts: the ‘independent’ function and the ‘ancillary’ function.²⁷⁵ The former operates ‘to justify the imposition of liability when there would be no liability in the absence of intention’, or to justify the imposition of ‘liability for types of harm which would not otherwise be actionable’.²⁷⁶ The latter signifies the function ‘to justify the awarding of remedies which would not be available in the absence of intention’,²⁷⁷ for instance to award punitive damages or to affect the rule of remoteness, making it more favourable to the plaintiff.²⁷⁸ In terms of this ‘ancillary’ function altering the rule of remoteness, in *Wilkinson v Downton*, Wright J appeared to be willing to grant recovery regardless of whether the plaintiff’s physical injury was foreseen/foreseeable or not.²⁷⁹ It has also been commented that the concept of intention in the *Wilkinson v Downton* tort has been given a role by Canadian courts to justify compensation for *unforeseeable* psychiatric illness or physical harm incurred by intentional wrongdoing.²⁸⁰ This ‘ancillary’ function in a sense is also reflected in the Supreme Court’s dicta in *Rhodes v OPO*, where the required *object* of intention can be ‘severe emotional distress’ but the required consequence is ‘recognised psychiatric illness’.²⁸¹ As long as the defendant aims at causing ‘severe emotional distress’ or has foreseen it as substantially certain to occur, he or she should be liable for the resulted ‘recognised psychiatric illness’. And there appears to be no requirement that the ‘recognised psychiatric illness’ must be foreseeable. According to the majority of the Supreme Court, ‘[a] loose analogy may be drawn with the “egg shell skull” doctrine’, since ‘a person who actually intends to cause another to suffer severe mental or emotional distress (which should not be understated) bears the risk of legal liability if the deliberately inflicted severe distress causes the other to suffer a recognised psychiatric illness’.²⁸²

²⁷⁵ Cane (n 35) at 545.

²⁷⁶ *ibid* at 546.

²⁷⁷ *ibid* at 547.

²⁷⁸ *ibid* at 547-548.

²⁷⁹ ‘[I]t is no answer in law to say that more harm was done than was anticipated’, see *Wilkinson v Downton* (n 1) at 59.

²⁸⁰ Réaume (n 48) at 542 and 549.

²⁸¹ *Rhodes v OPO* (n 16) at para 88 per Lady Hale and Lord Toulson. The object of intention is ‘at least severe mental or emotional distress’.

²⁸² See *ibid* at para 87 per Lady Hale and Lord Toulson.

Returning to the SLC Report, it seems obvious that the framework proposed there envisaged that intention would exercise both an ‘independent’ and an ‘ancillary’ function, which could alter the legal status quo of cases completely. In the light of the principle that ‘more extensive recovery for loss suffered is justified by the more stringent criteria to be satisfied before imposing liability’,²⁸³ as well as the need to preserve the stability and fairness of law, the mental element at issue ought to be precisely circumscribed, given its potential to achieve significant change with regard to the existing framework. Therefore, taking into account the frameworks of both intentionally and negligently incurred mental harm provided in the SLC Report, *the construct of intention should be a restricted one – at least it should not include the notion of recklessness.*

3.66 Conclusion – the construct of intention, after *Rhodes*

This review of the structure and prerequisites of intentionally and negligently inflicted mental harm provided in both the Restatement (Third) of Torts and SLC Report shows that an expansive definition of the scienter element is acceptable, as long as it does *not* serve an ‘independent’ or an ‘ancillary’ function, or operate as one of the principal control devices within the delict/tort of intentionally inflicted mental harm. In contrast, a more clearly circumscribed definition is necessary if the construct of intention does serve such functions. For present purposes, the latter approach is more appropriate. In other words, intention is here required to perform an important differentiating role. Accordingly, the meaning of intention requires to be clearly circumscribed, as discussed further below.

3.661 ‘Recklessness’ should be excluded

First of all, recklessness should not be included within the construct of intention, nor should the same legal effect be attached to both reckless and intentional wrongdoing,

²⁸³ Stilitz and Sales (n 53) at 436.

as submitted in the Restatement (Third) of Torts.²⁸⁴ The Supreme Court in *Rhodes v OPO* explicitly determined ‘not to include recklessness in the definition of the mental element’, since recklessness was not ‘a term used in *Wilkinson v Downton* or *Janvier v Sweeney*’, and it may bring about ‘problems of definition’.²⁸⁵ The borderline between recklessness and negligence in many situations is unclear even blurred. As analysed above,²⁸⁶ the element of ‘actual knowledge/foresight of the risks’ cannot fully distinguish the notion of recklessness from that of negligence. Furthermore, the balancing of risk or examination of the element of reasonableness is significant to both recklessness and negligence cases,²⁸⁷ which underlines the difficulties of distinguishing between them.²⁸⁸ As the notion of recklessness can often lie so close to negligence, it is not advisable to include recklessness into the construct of intention, or to assimilate in respect of legal effect intention and recklessness. Inclusion of recklessness would compromise the functionality of intention as one of the main control devices for this tort. In brief, recklessness should not be included in the construct of intention, and reckless infliction of mental harm is more appropriately addressed within the tort of negligently caused psychiatric injury.²⁸⁹

3.662 ‘Foresight with substantial certainty’ should be included

The remaining question, if recklessness is omitted, is what should remain within the restricted sense of intention? The most stringent standard would insist upon *intention based upon purpose (ends or means)*, but is it more appropriate to include both the scienter of *foresight with substantial certainty* as well as *purpose (ends or means)*?

²⁸⁴ Restatement (Third) of Torts §46 (2012) (n 122).

²⁸⁵ *Rhodes v OPO* (n 16) at para 87 per Lady Hale and Lord Toulson.

²⁸⁶ See section 3.54.

²⁸⁷ *ibid.*

²⁸⁸ See *ibid.* A difference *in essence* may not exist. However, the magnitude of imbalance or unreasonableness found in cases regarding recklessness would generally be greater than that found in cases of negligence.

²⁸⁹ Parallel views can be seen in C Slade, ‘Intentional Infliction of Mental Suffering: Reconsidering the Test for Liability’ (2008) 34 *Advoc Q* 322 at 343. ‘I disagree with the position that recklessness is sufficient to ground liability under the *Wilkinson* test...where the reckless conduct of an actor causes harm that was foreseeable, the more appropriate approach is in negligence and not in tort premised upon intentional wrongdoing’.

Different theoretical grounds for or against the inclusion of *foresight with substantial certainty* into the construct of intention have been investigated above,²⁹⁰ which should not be repeated here. Nonetheless, the essence of these arguments and the position of this thesis can be briefly summarised as follows:

First of all, this thesis is inclined to agree with the view which supports the inclusion of *foresight with substantial certainty* in the construct of intention. Where an actor has foreseen (in an actual or constructive manner) some side-effects as substantially certain to happen, *inseparably or inevitably linked to* his or her own act, but nevertheless deliberately engages in this act, *consciously choosing or accepting the course leading to the occurrence* of the consequence, it seems more warranted to categorise this frame of mind as ‘intention/intentional’, rather than to place it under the head of ‘unintentional’, ‘negligent’, or ‘reckless’.²⁹¹ Because these theories regarding ‘foreseen as substantially certain’, ‘inseparably or inevitably brought about by one’s act’, and ‘having options, choosing or accepting the course which would inevitably lead to the occurrence of the consequence’ are *general propositions* in relation to conduct, knowledge or consciousness, consequences and the inevitability of consequences, there appears to be no reason why they cannot be applied in the area of tort.

Secondly, the inclusion of the scienter of both the *purpose (ends or means)* and *foresight with substantial certainty* in the construct of intention would be compatible with judicial practice in relation to this tort. As explored above in section 3.42, *knowledge/foresight with substantial certainty (or high likelihood)* has been broadly recognised as a basis of intention, in both English and Commonwealth cases.²⁹²

Thirdly, the notion of *foresight with substantial certainty* may be considered as the most suitable interpretation of the equivocal term ‘calculated’ employed in *Wilkinson v Downton*.²⁹³ This takes into account other comments by Wright J to the effect that

²⁹⁰ See section 3.44.

²⁹¹ See sections 3.442 and 3.443.

²⁹² See section 3.42.

²⁹³ See section 3.4432.

because grave effects were foreseen as *substantially certain*, it becomes ‘difficult to imagine that such a statement...could fail to produce grave effects’.²⁹⁴

Fourthly, apart from the above arguments submitted previously, another reason to support the inclusion of ‘foresight with substantial certainty’ is that this formulation allows secondary victims to be dealt with on the basis of this tort. The position of secondary victims is investigated in Chapter 5. In this category, a third party who is the immediate target of the wrongdoer is always involved. The mental harm at issue would be inflicted upon the secondary victim, in an intentional manner, through his or her perception of the injury caused by the wrongdoer to the third party.²⁹⁵ The mental state on the part of the wrongdoer towards the secondary victim, in the light of the case law discussed in Chapter 5, can be characterised as an intention based upon knowledge (with substantial certainty or sufficiently high likelihood) – namely, the wrongdoer has known/foreseen the mental harm as ‘substantially certain’ to be inflicted upon the secondary victim, following from his or her primary wrongdoing.²⁹⁶ As a result, the notion of intention based upon ‘foresight with substantial certainty’ can be taken as an indispensable component of secondary victim claims in relation to this tort.

Lastly, if ‘foresight with substantial certainty’ is to be included in the construct of intention, two points concerning ‘substantial certainty’ and ‘actual foresight’ should be reiterated. Firstly, in order to distinguish actors who ‘can choose or accept the course which would inevitably lead to the occurrence of the consequence’ from those who simply take risks, ‘substantial certainty’ should be required, despite practical difficulties in drawing boundaries between ‘substantial certain’ and ‘sufficiently likely’.²⁹⁷ As discussed, although some cases appear to have required merely a high degree of likelihood or foreseeability, other wordings featuring in those judgments – such as ‘cannot be heard to say that he did not “mean” it’ – still reflect the sense of ‘substantial certainty’.²⁹⁸

²⁹⁴ *Wilkinson v Downton* (n 1) at 59 per Wright J.

²⁹⁵ See Chapter 5, section 5.1.

²⁹⁶ See Chapter 5, section 5.422.

²⁹⁷ See section 3.4433.

²⁹⁸ *ibid.* The cases reviewed for this point include *Wong v Parkside Health NHS Trust* (n 9); *C v D, SBA* (n 57); *Rhodes v OPO* (n 16); *ABC v WH 2000 Ltd v William Whillock* (n 142).

As to ‘actual knowledge or foresight’, as discussed, the categorical requirement of *actual* or *subjective* foresight may not be feasible in practice. Since direct evidence is almost invariably absent, it seems unavoidable that courts must resort to the actor’s conduct, contextual circumstances, and the test of what can be objectively foreseen by a reasonable person, to infer the actor’s *actual* or *subjective* knowledge or foresight.²⁹⁹ On practical grounds it is warranted to accept the notion of *constructive* knowledge or foresight alongside that of *actual* knowledge or foresight.

3.663 The current and potential function of intention in relation to this tort

As explored, in *Rhodes v OPO*, the majority’s rephrasing of the object of intention as ‘at least severe mental or emotional distress’, whilst maintaining ‘recognised psychiatric illness’ as the required threshold of consequence,³⁰⁰ can in a sense be construed as giving the mental element of this tort an ‘ancillary’ role,³⁰¹ since there is no requirement that the resulted ‘recognised psychiatric illness’ must be foreseen or foreseeable.³⁰² Yet the question as to whether, in future, a more important role is to be played by the mental element of this tort – namely, ‘to justify imposing tort liability for types of harm which would not otherwise be actionable’³⁰³ – still requires to be answered. This will be the core issue to be investigated in the next chapter.

²⁹⁹ *ibid.*

³⁰⁰ *Rhodes v OPO* (n 16) at para 88 per Lady Hale and Lord Toulson.

³⁰¹ Regarding the ‘ancillary’ function of intention in tort, see Cane (n 35) at 547-548.

³⁰² See *Rhodes v OPO* (n 16) at paras 87-88 per Lady Hale and Lord Toulson.

³⁰³ The ‘independent’ function of intention in tort. See Cane (n 35) at 546.

Chapter 4 Issues Regarding Stand-alone Mental Harm

The essential argument of this chapter is that, despite falling short of the traditional threshold of recognised psychiatric illness, the intentional and unjustifiable infliction of *severe emotional distress*, which is capable of constituting *mental harm*, should give rise to delictual liability. In this chapter, the author will firstly examine the traditional distinction between recognised psychiatric illness and mere emotional distress, to explore the legal ground for this distinction. Following the principles derived therefrom, the author will seek to delineate the boundary of mental harm as *deviation from normal or trivial emotions*. Arguably, this concept of mental harm can be differentiated from recognised psychiatric illness as well as from mere emotional distress. Despite functioning well in many cases, the categorical insistence on recognised psychiatric illness as the threshold of compensable damage may entail problems and inconsistencies. Whether or not this traditional threshold can to some extent be lowered will be explored following a review of relevant legal literature and case law. After this examination, if it is warranted that the traditional threshold in relation to this tort can be lowered to ‘mental harm’ or ‘severe/significant emotional distress’, the relevant criteria for finding ‘mental harm’ – namely, ‘Deviance’, ‘Distress’, ‘Dysfunction’, and ‘Danger’ – will also be analysed and examples will be suggested.

4.1 Introduction

This chapter aims to deal with one of the essential features of the tort of ‘intentionally inflicted mental harm’, namely *mental harm suffered independently of an injury to any other of the pursuer’s protected rights or interests*. For the sake of brevity, the term ‘stand-alone mental harm’ is adopted here. ‘Mental harm’ has been employed by the Scottish Law Commission in its Report on *Damages for Psychiatric Injury* as a generic

term¹ for both intentionally inflicted cases as well as cases founded upon unintentional wrongdoing, though the two categories of cases are differentiated in respect of the threshold of liability.² According to the Scottish Law Commission, mental harm can be denoted as ‘any harm to a person’s mental state, mental functioning or well-being whether or not the harm amounts to a medically recognised mental disorder.’³ Although it was adopted by the Scottish Law Commission as a generic term, the usage of ‘mental harm’ is rarely to be found in the case law. The reason lies possibly in the fact that, this area of delictual liability in the past was mostly identified by courts under the name of ‘nervous shock’,⁴ but nowadays in respect of ‘psychiatric injury’ (or psychiatric damage/harm/illness/disorder). As regards *mental harm suffered independently of any injury to the pursuer’s other protected rights or interests*, the commonly used expressions in legal practice, especially in cases founded upon negligence, are *pure* psychiatric injury/damage/harm. For the sake of conceptual differentiation, these traditional expressions will be retained in discussions involving *negligence* cases pertinent to psychiatric injury/damage/harm.

Although the term ‘nervous shock’ has been well used in the past,⁵ and is still employed to describe one of prerequisites for a successful claim for psychiatric injury or damage,⁶ the courts have come to appreciate that it is not the real subject of this sort of claim.⁷ Rather, nervous shock, defined by the House of Lords in *Alcock v Chief Constable* as ‘the sudden appreciation by sight or sound of a horrifying event, which

¹ Scottish Law Commission, *Damages for Psychiatric Injury* (Scot Law Com No 196, 2004) para 3.8. It should be noted that the legal framework proposed in this Report was not taken up by the Scottish Parliament. A Scottish Government consultation (<http://www.gov.scot/Publications/2013/12/7197/11>) determined that what was proposed by the SLC would not represent an improvement on the current situation. However, among the responses to the consultation, Respondent 042 pointed out, in respect of intentional infliction of mental harm, that while the proposal allowed for recovery in respect of a tremendously wide range of emotional reactions, the only control mechanism was imprecise even vague, ‘leaving much to the judicial imagination as to what a reasonable person can be expected to endure’. Further filters were required to rule out trivial or vexatious claims (<http://www.gov.scot/Publications/2013/08/5509/downloads>). In similar vein see D Nolan, ‘Reforming Liability for Psychiatric Injury in Scotland: A Recipe for Uncertainty?’ (2005) 68 MLR 983 at 985-986.

² Scottish Law Commission (n 1) paras 3.9-3.10.

³ *ibid* para 3.8.

⁴ On the history of liability for ‘nervous shock’, see H Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (2009) 43-56.

⁵ *McLoughlin v O’Brian* [1983] 1 AC 410 at 418 per Lord Wilberforce.

⁶ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 400-401 per Lord Ackner.

⁷ *Page v Smith* [1996] AC 155 at 189 per Lord Lloyd of Berwick.

violently agitates the mind',⁸ is merely the means or the process, through which mental harm can be inflicted upon the victims or claimants. By contrast, what is at issue in awarding compensation is the enduring mental harm. In legal practice, mental harm has frequently been expressed in the form of emotional distress, or something more than that, a recognised (recognisable) psychiatric illness. The established rule in regard to pure psychiatric injury (damage or harm) is: in the law of negligence duty of care will not be recognised in relation solely to emotional distress, anxiety, grief, sorrow or any normal human bereavements.⁹ Only a recognised or recognisable psychiatric illness is recoverable.¹⁰ This traditional rule will be explored further in the following sections.

4.2 Emotional distress, mental harm, and recognised psychiatric illness

4.21 The traditional distinction between emotional distress and recognised psychiatric illness

As mentioned, in negligence cases related to pure psychiatric injury (damage or harm), current legal practice has drawn a well-established distinction between emotional distress and recognised/recognisable psychiatric illness. Whilst the former is worthy of sympathy, only the latter deserves compensation. This rule in principle also applies to cases involving intentionally inflicted mental harm, but may be less clear-cut therein. The following review explores the basis for this distinction both in negligently and intentionally inflicted mental harm cases. Several cases founded on negligence are worthy of review here because, apart from the fact that the traditional distinction drawn in them also applies to intentional cases, they in a sense shed light upon the boundary of mental harm, as well as upon the reasons why compensation for mere emotional distress should be rejected.

⁸ *Alcock v Chief Constable of South Yorkshire Police* (n 6) at 401 per Lord Ackner.

⁹ *Dulieu v White & Sons* [1901] 2 KB 669 at 673 per Kennedy J; *McLoughlin v O'Brian* (n 5) at 431 per Lord Bridge of Harwich; *Alcock v Chief Constable of South Yorkshire Police* (n 6) at 416-417 per Lord Oliver of Aylmerton.

¹⁰ *Page v Smith* (n 7) at 189 per Lord Lloyd of Berwick; *McLoughlin v O'Brian* (n 5) at 431 per Lord Bridge of Harwich.

4.211 Negligently inflicted psychiatric injury/damage/harm:

The contexts to which the negligence cases relate can broadly be divided into three different categories: 1) cases regarding primary victims; 2) cases regarding secondary victims; and 3) cases regarding stress (or mental harm) negligently caused in the work place. The distinction between primary and secondary victims in the realm of negligently caused psychiatric injury, as well as the relevant case law, is discussed further in Chapter 5.¹¹ On the basis of the case law reviewed therein, it seems to be accepted that, despite being a fluid concept, ‘primary victim’ denotes a participant directly involved in the wrongdoing/accident.¹² In contrast, ‘secondary victim’ can be taken as one who is a non-participant in a wrongdoing/accident, but merely as a witness, spectator or bystander.¹³ In addition to those who are directly involved, the category of primary victim is also capable of being extended to those ‘within the range of foreseeable physical injury (or danger)’, or, more controversially, to those who have found themselves the ‘unwitting cause’ of harm to another.¹⁴ In respect of the third category, the primary/secondary victim categorisation is plainly not relevant since the existence of duty on the part of the employer is uncontroversial, and guidance as to employers’ standard of care is found in the House of Lords decision in *Barber v Somerset County Council*.¹⁵ Issues remain, however, as to the level of harm that is compensable.

Despite the contextual differences, the distinction between emotional distress and recognised psychiatric illness has been explicitly drawn in all of the three subdivisions:

¹¹ See Chapter 5, section 5.11.

¹² See *ibid.*

¹³ See *ibid.*

¹⁴ See *ibid.*

¹⁵ See *Barber v Somerset County Council* [2004] UKHL 13; [2004] 1 WLR 1089 at paras 5, 7, 10, 14 and 15 per Lord Scott (dissenting); as well as at paras 65-68, and 71 per Lord Walker (agreed by the majority). See also the Court of Appeal decision ([2002] EWCA Civ 76; [2002] 2 All ER 1) given by Lady Justice Hale, in particular para 43.

1) Cases regarding primary victims:

It was pointed out in *Page v Smith*, that ‘it is sometimes said that if the law were such as I believe it to be, the plaintiff would be able to recover damages for a fright. This is not so. Shock by itself is not the subject of compensation, any more than fear or grief or any other human emotion occasioned by the defendant’s negligent conduct. It is only when shock is followed by recognisable psychiatric illness that the defendant may be held liable’.¹⁶

2) Cases regarding secondary victims:

Obviously the duty of care in negligence is not owed to the world as a whole. Nor should such duty, as regards pure psychiatric harm, be owed in respect of any emotional distress considered by the society as trivial or reasonable to be endured. In *Bourhill v Young*, involving a claim by a bystander of a road accident, Lord Porter reasoned that ‘[t]he driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm’.¹⁷

In *Dulieu v White & Sons*, it was stated that ‘[t]he use of the epithet “mental” requires caution, in view of the undoubted rule that merely mental pain unaccompanied by any injury to the person cannot sustain an action of this kind.’¹⁸

In *Hinz v Berry* Lord Denning MR said that ‘[i]n English law no damages are awarded for grief or sorrow caused by a person’s death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to

¹⁶ *Page v Smith* (n 7) at 189 per Lord Lloyd of Berwick.

¹⁷ *Bourhill v Young* 1942 SC (HL) 78 at 98 per Lord Porter.

¹⁸ *Dulieu v White & Sons* (n 9) at 673 per Kennedy J.

put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant’;¹⁹ and Lord Pearson suggested ‘that this lady is not only in a sad and depressed state...but something more than that: she has been and still is in a positively morbid state. There is a recognisable psychiatric illness’.²⁰

In *McLoughlin v O'Brian* Lord Bridge opined that ‘[t]he common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness. That is here not in issue.’²¹

Lord Oliver, in *Alcock v Chief Constable*, stated that ‘[g]rief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation ... to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point.’²²

Lord Griffiths further explained in *White v Chief Constable of South Yorkshire Police* that ‘[b]ereavement and grief are a part of the common condition of mankind which we will all endure at some time in our lives. It can be an appalling experience but it is different in kind from psychiatric illness and the law has never recognised it as a head of damage.’²³

¹⁹ *Hinz v Berry* [1970] 2 QB 40 at 42 per Lord Denning MR.

²⁰ *ibid* at 44 per Lord Pearson.

²¹ *McLoughlin v O'Brian* (n 5) at 431 per Lord Bridge of Harwich.

²² *Alcock v Chief Constable of South Yorkshire Police* (n 6) at 416 per Lord Oliver of Aylmerton.

²³ *White (Frost) v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 465 per Lord Griffiths.

It seems obvious that, in the light of the dicta stated in the above cases, a distinction has been made between (recognised/recognisable) psychiatric illness and normal (ordinary/common) human emotions.

3) Cases regarding stress (or mental harm) negligently caused in work place:

In *Ward v Scotrail Railways Ltd*, a Scottish Outer House case which was considered as founded upon negligence rather than upon intentional wrongdoing,²⁴ Lord Reed reckoned that '[i]n the context of personal injury actions founded on negligence...it appears to be clear that emotional distress is not enough to found an action: the pursuer must have suffered physical injury. This may take the form of a recognisable psychiatric illness...'.²⁵

In *Rorrison v West Lothian College*, another Scottish Outer House case, Lord Reed elucidated that '[t]he action being based on negligence, the pursuer can recover only if she has sustained psychiatric injury in the form of a recognised psychiatric illness';²⁶ 'Many if not all employees are liable to suffer those emotions...such as stress, anxiety, loss of confidence and low mood. To suffer such emotions from time to time, not least because of problems at work, is a normal part of human experience. It is only if they are liable to be suffered to such a pathological degree as to constitute a psychiatric disorder that a duty of care to protect against them can arise...'.²⁷

Similarly in *Cunningham v Glasgow City Council*, the aforesaid distinction between normal emotions and recognised psychiatric illness was restated: '[i]n support of this proposition, counsel referred to *Angela Rorrison v West Lothian Council*...Counsel submitted that it was well settled law that it was only in circumstances where the pursuer was liable to suffer stress, anxiety or other consequences to such a pathological

²⁴ *Ward v Scotrail Railways Ltd* 1999 SC 255 at 259 per Lord Reed.

²⁵ *ibid* at 259-260 per Lord Reed.

²⁶ *Rorrison v West Lothian College* 1999 Rep LR 102 at para 16-08 per Lord Reed.

²⁷ *ibid* at para 16-22 per Lord Reed.

degree as to constitute a psychiatric disorder that a duty of care could arise’.²⁸

In short, after reviewing the above cases, the established rule in the law of negligence is that: by contrast with recognised psychiatric illness, emotional distress (or grief, sorrow, stress, or anxiety) which belongs to normal human emotions without a pathological nature, or which is an ordinary condition of life that people usually experience and endure, is not regarded as recoverable where it occurs independently of another form of harm to the pursuer.

4.212 Intentionally inflicted mental harm:

Although the contexts of cases to be reviewed below are also different, all of them can be considered as authorities of relevance to this tort.

In *Khorasandjian v Bush*, a case in effect involving harassment before the enactment of the Protection from Harassment Act 1997, Dillon LJ advised that ‘[t]he injury for which damages were claimed in *Wilkinson v Downton* and *Janvier v Sweeney* was in both those cases described as “nervous shock”. On modern authorities in the law of negligence, that term is understood as referring to recognisable psychiatric illness with or without psychosomatic symptoms...It is distinguished from mere emotional distress.’²⁹

In *Wong v Parkside Health NHS Trust*, a case similarly involving harassment before 1997, Lady Justice Hale explained that ‘[f]or the tort to be committed, as with any other action on the case, there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant’s interest in his freedom from such harm.’³⁰ It seems explicit that in this case

²⁸ *Cunningham v Glasgow City Council* [2008] CSOH 113 at para 6 per Lady Clark of Calton.

²⁹ *Khorasandjian v Bush* [1993] QB 727 at 736 per Dillon LJ.

³⁰ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721; [2003] 3 All ER 932 at para 12 per Lady Justice Hale.

alarm and emotional distress were differentiated from recognised psychiatric illness,³¹ and only the latter was regarded actionable or recoverable.

In *Wainwright v Home Office*, a case involving the inappropriate strip search by prison officers of a prisoner's visitors, Lord Hoffmann reserved judgment as to whether compensation should be payable where 'mere distress' had been intentionally inflicted.³² However, the reasoning in that case appeared to leave it open, in the context of privacy issues, that liability might arise where a recognised psychiatric illness had been inflicted intentionally.³³

In *Rhodes v OPO*, the Supreme Court took the opportunity to review the prerequisites of the *Wilkinson v Downton* tort,³⁴ and concluded that physical harm or recognised psychiatric illness is required for the consequence element of this tort.³⁵ Although Lord Neuberger argued that 'significant distress' might be actionable in qualified circumstances,³⁶ the majority held the line that in cases of intentionally inflicted mental harm, recognised psychiatric illness is an element which must be established before a claimant could obtain compensation. This distinction or limitation is said to 'have been imposed in cases of negligence as a matter of policy, and it has been justified in a number of cases on the ground that grief and distress are part of normal life, whereas psychiatric illness is not'.³⁷

The distinction between emotional distress and recognised psychiatric illness thus continues to be maintained in cases related to negligently inflicted (pure) psychiatric injury and intentionally inflicted (stand-alone) mental harm. The weight of authority has endorsed the recoverability of recognised psychiatric illness, whilst denying compensation for mere emotional distress. Nonetheless there is, certainly, also some

³¹ *ibid* at para 11 per Lady Justice Hale.

³² *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 at paras 45-46 per Lord Hoffmann.

³³ *ibid* at para 47 per Lord Hoffmann. Also see another English case, *C v D, SBA* [2006] EWHC 166 (QB) at para 94 per Justice Field: '[i]t is clear from what Lord Hoffmann says...the principle in *Wilkinson v Downton* (including imputed intention) is only available if the harm suffered is a recognised psychiatric injury: the principle does not allow recovery for emotional distress'.

³⁴ *Rhodes v OPO* [2015] UKSC 32; [2016] AC 219 at paras 73-90 per Lady Hale and Lord Toulson.

³⁵ *ibid* at para 88 per Lady Hale and Lord Toulson.

³⁶ *ibid* at para 119 per Lord Neuberger.

³⁷ *ibid* at para 118 per Lord Neuberger.

contrary authority, which will be discussed in later sections.

In cases pertaining to pure psychiatric injury founding upon negligence, any normal emotion or emotional reaction which is a common condition of daily life that we will all experience or have to endure at some point of time will not be compensated.³⁸ There was little discussion about this in *Rhodes v OPO* and most other cases regarding intentionally inflicted (stand-alone) mental harm, but they still observe the distinction between emotional distress and recognised psychiatric illness, which seems suggestive of an implied acceptance of this principle.

A comparable approach has been adopted in Restatement (Third) of Torts §46 (intentionally or recklessly caused emotional harm)³⁹ and the SLC Report on *Damages for Psychiatric Injury*.⁴⁰ Pursuant to Restatement (Third) of Torts §46, ‘severe’ rather than minor or transient emotional harm is required for liability because ‘emotional harm, even significant harm, is part of the price of living in a complex and interactive society’,⁴¹ and consequently ‘[t]he law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it’.⁴² The SLC Report similarly recommended that recovery for stand-alone mental harm, irrespective of its being caused intentionally or negligently, should be limited to exclude those reactions commonly or reasonably expected to be endured in life:⁴³ ‘the normal stresses or vicissitudes of life or of the type of life which that person leads’;⁴⁴ or ‘bereavements or losses of a type which persons can reasonably expect to suffer in the course of their lives’.⁴⁵ These restrictions appear to be in accordance with the underlying principle of the traditional distinction, which requires further investigation.

³⁸ As in the passages cited above from *McLoughlin v O’Brian* (n 5); *Alcock v Chief Constable of South Yorkshire Police* (n 6); *White (Frost) v Chief Constable of South Yorkshire Police* (n 23); *Rorrison v West Lothian College* (n 26).

³⁹ Restatement (Third) of Torts §46 (2012) Comment j.

⁴⁰ Scottish Law Commission (n 1) paras 3.18 to 3.30.

⁴¹ Restatement (Third) of Torts §46 (2012) (n 39) Comment j.

⁴² *ibid.*

⁴³ Scottish Law Commission (n 1) para 3.30.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

4.22 The boundaries of mental harm

4.221 The concept of mental harm

The case law reviewed above, as well as the SLC Report, explicitly or impliedly supports the principle that there should be no compensation for the normal emotions or vicissitudes of life. But what is the legal ground for this non-recovery principle? There may be two possible explanations. Firstly, normal human emotions or the ordinary conditions of life that individuals customarily endure *should not be regarded as 'harm'*. In cases where no harm or no mental harm has been incurred, it is comprehensible and reasonable that no compensation should be awarded. Secondly, *though 'harm' has been incurred*, in certain situations courts *are inclined to deny recovery to pursuers based upon policy considerations*, most notably the fear of the 'floodgates' effect. In other words, courts might be overwhelmed by an increase in litigation, in the event that the normal emotions or vicissitudes of life which everyone experiences were to be recognised as compensable. This is what Lord Oliver of Aylmerton in *Alcock v Chief Constable* described, in warning that 'to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point'.⁴⁶

The cases reviewed above, including those founded upon negligence and those founded upon intentional wrongdoing, suggest that the first consideration above takes prominence: shock or normal human emotion is 'not the subject of compensation';⁴⁷ and '[b]ereavement and grief' has never been 'recognised...as a head of damage'.⁴⁸ It is said that '[f]or the tort to be committed...there has to be actual damage. The damage is physical harm or recognised psychiatric illness'.⁴⁹ Thus 'the consequence element' requires 'physical harm or recognised psychiatric illness'.⁵⁰ These dicta

⁴⁶ *Alcock v Chief Constable of South Yorkshire Police* (n 6) at 416 per Lord Oliver of Aylmerton.

⁴⁷ *Page v Smith* (n 7) at 189 per Lord Lloyd of Berwick.

⁴⁸ *White (Frost) v Chief Constable of South Yorkshire Police* (n 23) at 465 per Lord Griffiths.

⁴⁹ *Wong v Parkside Health NHS Trust* (n 30) at para 12 per Lady Justice Hale.

⁵⁰ *Rhodes v OPO* (n 34) at para 88 per Lady Hale and Lord Toulson.

allow us to identify what does *not* belong to the concept of mental harm, clarifying the boundary of mental harm in the sense of *deviation from normal emotions or the ordinary conditions of life*.

Though the SLC adopted mental harm as a generic term, it merely interpreted mental harm as ‘any harm to a person’s mental state, mental functioning or well-being’,⁵¹ without defining what constitutes harm or what is the substantial content of mental harm. Indeed, it may be a difficult or even impossible task to define mental harm precisely, given that this judgment in most cases needs to be made by medical experts, and that ‘psychiatric medicine is far from being an exact science; the opinions of its practitioners may differ widely’.⁵² A similar perspective can be derived from the fact that after due deliberation, the (English) Law Commission finally concluded that rendering a statutory definition of recognisable psychiatric illness would be an impracticable task.⁵³ In contrast, the Restatement (Third) of Torts §45 does provide a definition of emotional harm, namely the ‘impairment or injury to a person’s emotional tranquility’,⁵⁴ which includes a variety of ‘detrimental’ mental conditions.⁵⁵ However, arguably, terms such as ‘impairment’, ‘injury’, or ‘detriment’ may not sufficiently define ‘(emotional) harm’, since they do not provide any guidance to the character and degree of ‘(emotional) harm’.

Admittedly, achieving an exact definition of mental harm may be difficult. Yet we should at least try to delineate its boundaries and determine what does not belong to the concept. In this respect, the above concept, *deviation from normal emotions or ordinary conditions of life*, should assist. After all, if a reaction does not remove the victim from his or her normal or original state, how can it be labelled as a harm? In such circumstances, there exists nothing to be restored or to be compensated. Accordingly, compensable mental harm should require some degree of deviation from the normal emotions or original mental status of the victim. This is a flexible rather

⁵¹ Scottish Law Commission (n 1) para 3.8.

⁵² *McLoughlin v O’Brian* (n 5) at 432 per Lord Bridge of Harwich.

⁵³ Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) para 5.2.

⁵⁴ See Restatement (Third) of Torts §45 (2012).

⁵⁵ *ibid* Comment a.

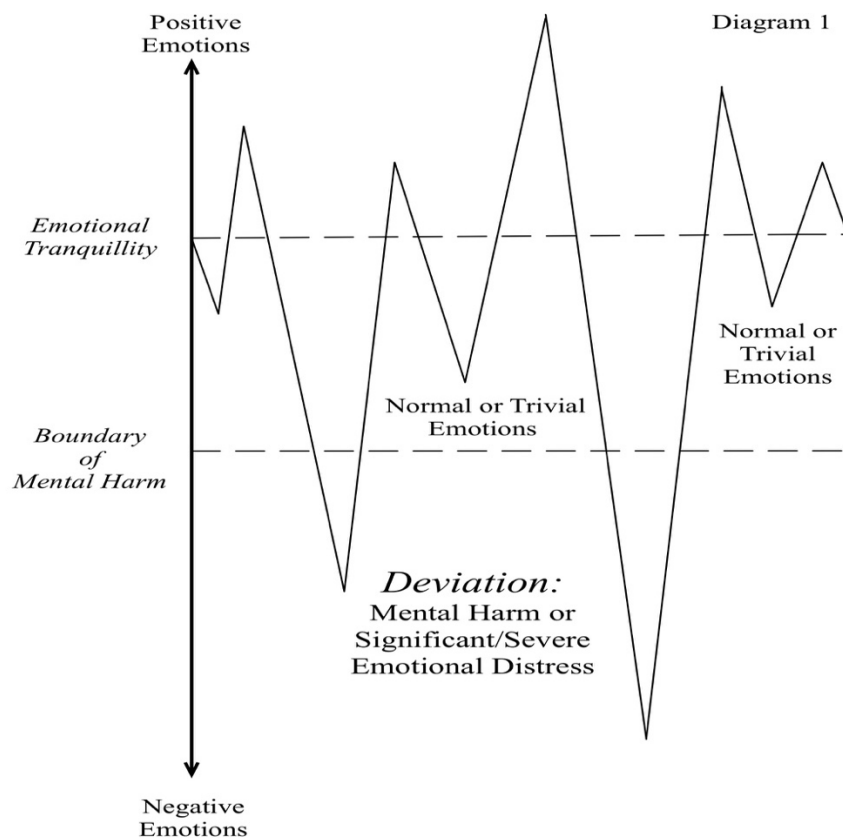
than exact boundary of mental harm.

This boundary, however, may need more elucidation. Though normal emotions, or the common or ordinary conditions of life, are widely employed terms in legal practice, they have not been fully clarified. What actually constitutes normal emotions? In addition, it may be unclear why recovery should be denied for certain emotions or emotional reactions due to their being commonly experienced and endured.

According to Handford, the nature of *being commonly experienced and endured* may not provide solid grounds for declining recovery, as it does not similarly undermine the compensability of physical harm and pain which is ordinarily encountered in life.⁵⁶ Therefore, in his opinion, this logic, broadly adopted by courts in cases related to pure psychiatric damage/harm, is merely an attempt to address the floodgates effect and to prevent trivial actions.⁵⁷ Based upon this understanding, it seems possible to interpret what is meant by *normal* emotions as *trivial* emotions. It is the triviality or insignificance which renders the emotional reactions at issue unrecoverable. Further, normal emotions can also be explicated by reference to Diagram 1 as follows:

⁵⁶ P Handford, *Tort Liability for Mental Harm* (3rd edn, 2017) para 6.50.

⁵⁷ *ibid.*



In this diagram the horizontal baseline represents *emotional tranquillity* (if such a thing actually exists). During daily life human emotions are presumed not to stay at the baseline. Rather, they move upwards and downwards. Moving in the upwards direction emotions can be considered as positive, and moving in the downwards direction emotions are negative. Except for exceptional cases, positive emotions are of less concern to the law. Thus the focus of this diagram is upon negative emotions. Though emotions continuously oscillate up and down, they leave the baseline merely within a small range and can return to it in a brief period of time. This imagined picture depicts the so-called *normal* or *trivial* emotions. However, there are situations where due to certain stimuli emotions might not act in this manner. They may depart markedly from the emotional baseline, becoming incapable of returning to the status of tranquillity or at least finding it difficult to achieve this within a short span of time.

These situations form the above-mentioned *deviation (from normal emotions)* and help us to delineate the contours of mental harm. The more markedly (seriously) the affected emotions depart from the emotional baseline, or the longer it takes for them to return to the original status, the more likely it is that the emotions at issue could be observed as *deviation*.

This description of the boundary of mental harm is consistent with Keating's interpretation of harm, under reference to the Restatement (Third) of Torts, as something 'detrimental, a change of condition for the worse',⁵⁸ turning people it afflicts into victims.⁵⁹ In addition, Keating further explains, that emotions or emotional reactions can be adjusted or mediated by ourselves,⁶⁰ so the crucial legal concern should be, in the circumstances in question, whether or not it is reasonable to ask people to accommodate themselves to emotions arising from the incurred incident: 'Tellingly, the emotional harm for which the law of NIED [negligent infliction of emotional distress⁶¹] allows recovery is harm that we either cannot or should not steel ourselves against'.⁶² In other words, recoverable emotional harm/distress 'has the characteristic of *not* being something people should be expected to master or to suffer uncomplainingly'.⁶³

In contrast, normal or trivial emotions are what people can or should be expected to sustain without complaint, thus they are not regarded as mental harm. This passage from Keating illuminates both the boundary of mental harm as well as the importance of '*deviation from normal (trivial) emotions*'.

⁵⁸ GC Keating, 'When Is Emotional Distress Harm?' in SGA Pitel, JW Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 273 at 299. Pertinent to this interpretation, also see M Hogg, 'Asbestos Related Conditions and the Idea of Damage in the Law of Delict' [2008] SLT (News) 207 at 208: 'This fundamental principle of the law of damages makes it crucial to be able to determine when someone has been harmed, when they are worse off as the result of a delict.'

⁵⁹ Keating (n 58).

⁶⁰ *ibid* at 300.

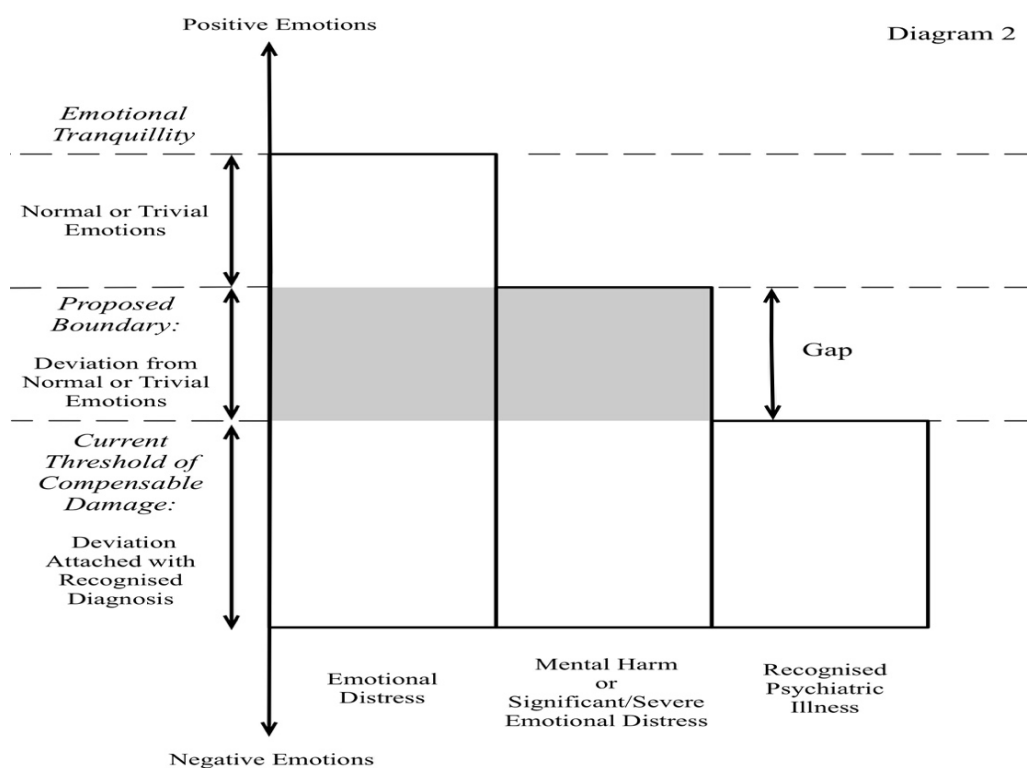
⁶¹ See *ibid* at 274.

⁶² *ibid* at 301.

⁶³ *ibid* at 303.

4.222 Mental harm and recognised psychiatric illness

The approach outlined in the section above has not hitherto been adopted by the courts, which have instead used the terminology of ‘recognised/recognisable psychiatric illness’ to filter out undeserving cases. Theoretically speaking, underpinned by the same principle,⁶⁴ the categories of recognised/recognisable psychiatric illness and mental harm should reflect the dichotomy between normal and abnormal (or deviating from normal) emotions.⁶⁵ However, as depicted in the following Diagram 2, there is still a gap (the grey area) left between them because in practice a deviation from normal or trivial emotions would not necessarily be assessed as recognised psychiatric illness. This gap may cause problems of under-compensation in particular cases as will be analysed further below. Before this, a brief explanation of what is meant by recognised/recognisable psychiatric illness is desirable.



⁶⁴ Namely that no compensation would be awarded for normal/trivial emotions or vicissitudes which people commonly experience. See section 4.221.

⁶⁵ See the above discussion.

4.2221 Recognised/Recognisable psychiatric illness

The terms ‘recognised’ or ‘recognisable’ psychiatric illness seem often to be used interchangeably in judicial reasoning, without any suggestion of alteration in meaning. From the decisions reviewed above, ‘recognisable’ is found in *Hinz v Berry*, *McLoughlin v O’Brian*, *Page v Smith*, *Ward v Scotrail Railways Ltd*, *Khorasandjian v Bush*, and the (English) Law Commission Report; whilst the term ‘recognised’ is used in *Rorrison v West Lothian College*, *Wong v Parkside Health NHS Trust*, *Wainwright v Home Office*, *C v D*, *SBA*, *Rhodes v OPO*, as well as the SLC Report. In a significant New Zealand Court of Appeal case, *van Soest v Residual Health Management Unit*, Blanchard J considered the term ‘recognisable’ as the preferred term since “‘recognisable’ perhaps will indicate an awareness by the Court that over time medical experts’ views about the nature of particular mental conditions are bound to be subject to some alteration, just as they are with respect to physical ailments... If the medical profession as a body is prepared to recognise a particular condition of the mind the Court should be willing to give credence to it as it does to a new virus or physical condition, such as occupational overuse syndrome.’⁶⁶ It is true that medical knowledge can alter and develop beyond current borders. However, given that ‘the medical profession as a body is prepared to recognise a particular condition of the mind’, it seems that a new consensus of psychiatric medicine has already formed. Otherwise without an existent consensus how can the medical profession be ‘prepared to recognise’ it? In the light of the existent (already formed) consensus the mental condition at issue can be regarded as ‘recognised’. There is no need to insist upon dubbing the agreed mental condition as ‘recognisable illness’. In fact, the usage of either of the two expressions may not result in too much difference.⁶⁷ Perhaps the term ‘recognisable’ indicates more flexibility, yet at the same time it imports more uncertainty. Given that the expression ‘recognised’ psychiatric illness was employed in the SLC Report,⁶⁸ as well as in *Wainwright v Home Office* and *Rhodes v OPO*, this

⁶⁶ *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at para 66 per Blanchard J.

⁶⁷ It has also been conceded that these expressions ‘seem to mean the same thing’, see *ibid*.

⁶⁸ The precise term adopted in the SLC Report is slightly different, namely ‘medically recognised mental disorder’: see Scottish Law Commission (n 1) paras 3.9-3.10.

usage is adopted here.

It is important also to consider how recognised psychiatric illness is evaluated. Whilst it may be impracticable to define recognised psychiatric illness in a precise manner,⁶⁹ it can be identified by medical diagnosis and assessment. In the diagnosis of psychiatric illness or mental disorder, the most prevalently adopted yardsticks are the two classificatory guidelines: ICD-10 and DSM-V,⁷⁰ but ordinarily expert medical evidence would still be required.⁷¹ ICD-10 denotes the International Statistical Classification of Diseases and Related Health Problems (10th Revision),⁷² of which mental and behavioural disorders are listed in Chapter V. DSM-V is the Diagnostic and Statistical Manual of Mental Disorders (5th Edition), which is published by American Psychiatric Association. As time goes by the current versions are replaced by successive new editions.⁷³ For instance, a version of ICD-11 was released in 2018, but has not yet been endorsed by the World Health Assembly.⁷⁴ Whilst DSM-V is primarily adopted in North America for psychiatric diagnoses, ICD-10 is used widely in the UK and in Europe.⁷⁵ Pursuant to ICD-10 Chapter V, mental and behavioural disorders are classified into 11 groups,⁷⁶ whilst DSM-V categorises mental disorders into 21 diagnostic classifications.⁷⁷

Though broadly utilised by courts as crucial yardsticks in assessing psychiatric illness, it should be borne in mind that these two diagnostic systems are formed and developed for clinician and research use rather than for legal use. In its ‘Cautionary Statement for

⁶⁹ Law Commission (n 53) para 5.2.

⁷⁰ The evolution of different versions of the DSM or the ICD have great influence upon the diagnosis. See KR Silk and P Tyrer, ‘Classification of Psychiatric Disorders and Their Principal Treatments’ in KR Silk and P Tyrer (eds), *Cambridge Textbook of Effective Treatments in Psychiatry* (2008) 3 at 3. On these two diagnostic systems see also D Marshall, J Kennedy and R Azib, *Litigating Psychiatric Injury Claims* (2012) paras 6.3-6.5.

⁷¹ Law Commission (n 53) para 5.1.

⁷² For 2016-WHO version see <http://apps.who.int/classifications/icd10/browse/2016/en#/V>.

⁷³ Marshall, Kennedy and Azib (n 70) para 6.4.

⁷⁴ The 72nd World Health Assembly will be held in May 2019. Information regarding ICD-11, see <https://www.who.int/classifications/icd/en/>.

⁷⁵ Marshall, Kennedy and Azib (n 70) para 6.4.

⁷⁶ World Health Organization, *International Statistical Classification of Diseases and Related Health Problems* (10th rev edn, 2016) Chapter V.

⁷⁷ See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn, 2013) Section II Diagnostic Criteria and Codes.

Forensic Use of DSM-5', the American Psychiatric Association explicitly warns of a risk that, if utilised for forensic objectives, 'diagnostic information will be misused or misunderstood',⁷⁸ due to the 'imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis'.⁷⁹ In order for the courts to derive useful assistance in forming their judgments, these standards should be used in a careful and appropriate manner, in conjunction with valid medical appraisals conducted by psychiatric professionals.

4.2222 The connection between mental harm and recognised psychiatric illness

In most cases recognised psychiatric illness is identified in the form of a certain mental illness or disorder diagnosed by psychiatric experts and admitted by the courts, with reference to (in rare situations, without reference to) the above-mentioned two classificatory systems. Therefore, a deviation from the normal emotional status or trivial emotions of the victim, which delineates the flexible bounds of mental harm, is indicated by a confirmed label of recognised psychiatric illness. But genuine mental harm does not in every case meet all the criteria for such a label. For instance, it is well-identified in the field of psychiatry that patients afflicted with 'partial' or 'subsyndromal' PTSD (Posttraumatic Stress Disorder) suffer from great health-related disability, functional impairment and difficulties, even suicidal thoughts and attempts.⁸⁰ As they may meet most, but not all, of the criteria of PTSD, a diagnosis of recognised psychiatric illness, namely PTSD, would not be attached to them.⁸¹ Nevertheless, the severity of such problems is still significantly worse than the difficulties which persons unaffected by PTSD may have.⁸² This point will be further elucidated in section 4.31.

⁷⁸ *ibid* 25.

⁷⁹ *ibid*.

⁸⁰ MJ Friedman, TM Keane and PA Resick (eds), *Handbook of PTSD: Science and Practice* (2nd edn, 2014) 31-32, and 541.

⁸¹ *ibid* 541.

⁸² *ibid* 31-32.

4.223 Mental harm and (mere) emotional distress

As discussed above, *pure* or *stand-alone* emotional distress, grief and anxiety are currently deemed by courts to be normal emotions or normal conditions (which people are expected to endure). Because there is no *deviation* from the norm, they are not thought to constitute recoverable harm. However, what has not been fully clarified is that emotional distress, grief and anxiety can manifest themselves in varying degrees. As delineated in Diagram 2 in section 4.222, the realm of emotional distress covers different fields. If sufficiently severe, emotional distress could deviate from normal or trivial emotional status. In this circumstance, in contrast to the mainstream legal practice, there is an argument for categorising them as mental harm. As also shown in Diagram 2, provided the emotional distress in question passes through the grey zone and surmounts the traditional threshold – namely acquiring certain diagnoses from medical experts, it is capable of being categorised as recognised psychiatric illness. Although a demarcation can be made between emotional distress, mental harm and recognised psychiatric illness as presented in Diagram 2, they to some extent overlap with each other, and the differences between them exist in the sense of degree rather than kind.⁸³

Viewpoints parallel to such an approach can be found in a Scottish Inner House case, *McLelland v Greater Glasgow Health Board*. Although this case strictly speaking is not related to *pure* psychiatric harm (as the claim arose from a ‘wrongful birth’), useful insights were provided to the effect that between recognised psychiatric illness and normal emotions/(mere) emotional distress, there is still scope in theory for the concept of mental harm to exist. In this case, the pursuers claimed for solatium, care and maintenance, and loss of wages on the basis of their son’s suffering from Down’s syndrome due to the negligence on the part of the defenders. Lord Prosser stated that he was not convinced by the clear-cut distinction made by Lord Bridge in *McLoughlin v O’Brian* between ‘grief, distress or normal emotion’ and ‘positive psychiatric

⁸³ Law Commission (n 53) para 3.33, ‘Psychiatry does recognise a distinction between mere mental distress and psychiatric illness, although the distinction between the two is a matter of degree rather than kind...’

illness’.⁸⁴ He reasoned that ‘between normal emotions and positive psychiatric illness, there will be many types of suffering, and indeed consequences which are more or less disabling, which Lord Bridge does not mention...And while one might not wish to describe the impact upon Mr McLelland as psychiatric illness...Nor does Mr McLelland’s devastation...seem to me to be adequately described as...simply the “normal emotional reaction”, with no lasting effect...’.⁸⁵

In addition, the reasoning in *Rhodes v OPO* might be regarded as reinforcing the theoretical distinction between emotional distress, mental harm and recognised psychiatric illness, by means of the court’s usage of ‘severe distress’ or ‘significant distress’. The majority of the court adopted the term ‘severe distress’ in respect of the *object of intention*, whereas the consequence (resulting harm) has to be recognised psychiatric illness or physical harm.⁸⁶ On the other hand, Lord Neuberger employed the term ‘significant distress’ for both the *object of intention* and the resulting harm.⁸⁷ Conceptually the terms ‘severe distress’ and ‘significant distress’ are differentiated *not only* from distress, grief and sorrow, *but also* from recognised psychiatric illness.⁸⁸ From the perspective of this thesis, the usage of ‘severe distress’ or ‘significant distress’ bears a substantial resemblance to the concept of mental harm. Lord Neuberger’s observations signal not only that there is scope, but also that it is practicable, for the concept of mental harm to be set between recognised psychiatric illness and emotional distress, grief and anxiety, either under this name or with a different title.

In conclusion, therefore, mere emotional distress (or grief and anxiety) is an overarching notion which can include all sorts of emotional reactions, ranging from normal to abnormal, or from trivial to severe (significant), as depicted in Diagram 2. The argument presented here is that where the emotional distress at issue is severe enough to deviate from a normal emotional state or from trivial emotions, it should be regarded as falling within the bounds of mental harm. Where emotional distress has

⁸⁴ *McLelland v Greater Glasgow Health Board* 2001 SLT 446 at para 11 per Lord Prosser.

⁸⁵ *ibid.*

⁸⁶ *Rhodes v OPO* (n 34) at para 88 per Lady Hale and Lord Toulson.

⁸⁷ *ibid* at para 119 per Lord Neuberger.

⁸⁸ See *ibid* at paras 83-88 per Lady Hale and Lord Toulson, and at paras 117-119 per Lord Neuberger.

crossed the grey zone in Diagram 2 and acquired a diagnosis from medical experts, it can be identified as recognised psychiatric illness. Despite not being different in terms of category, emotional distress, mental harm and recognised psychiatric illness can be demarcated, which is of assistance to deciding where recovery can be awarded.

4.3 Moving away from the requirement of recognised psychiatric illness

4.31 The problems arising from the categorical adoption of recognised psychiatric illness as the threshold of damage

Although in many cases the requirement for recognised psychiatric illness can function well as the appropriate control device, the insistence upon the psychiatric label also brings about problems and inconsistencies. First of all, as mentioned above, the major criteria –ICD-10 or DSM-V – to which courts refer when determining the existence of a recognised psychiatric illness are designed for clinical use rather than for legal or forensic use. As a result, there may exist an ‘imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis’.⁸⁹ As the ultimate concern of law is the (mental) harm caused to the pursuer rather than a psychiatric label, the current emphasis upon the latter seems to be misplaced. Moreover, there are circumstances where different psychiatrists may all agree that the pursuer has suffered from mental harm deviating from normal or trivial emotions, but disagree over the precise label of the psychiatric illness that has been caused.⁹⁰ Although this sort of contentiousness also occurs in physical harm cases, it is particularly acute in the field of psychiatric injury. For instance, in *ABC v WH 2000 Ltd v William Whillock*, a recent decision in relation to the *Wilkinson* tort following *Rhodes*, despite the expert witnesses having agreed that the claimant did suffer an ‘adjustment disorder’, they were in disagreement over ‘whether or not the Claimant still has symptoms referable to the abuse and its disclosure’, and whether she suffered from an ‘anxiety disorder’ or from a ‘lesser condition’ as ‘acute anxiety’.⁹¹

⁸⁹ American Psychiatric Association (n 77) 25.

⁹⁰ *van Soest v Residual Health Management Unit* (n 66) at para 106 per Thomas J.

⁹¹ *ABC v WH 2000 Ltd v William Whillock* [2015] EWHC 2687 (QB) at para 80 per Sir Robert

Furthermore, in *C v D, SBA*, a case where *Wilkinson v Downton* was adopted as one of the causes of action, experts on opposite sides were in dispute over whether or not C suffered from ‘Anti-social Personality Disorder (“ASPD”)’ – whether all of the characteristics of ASPD had been met and a diagnosis of it can be given accordingly.⁹² Justice Field found C as ‘not suffering from ASPD’. However, he was convinced that C did suffer from ‘mental abnormality as distinct from emotional distress’.⁹³ In his conclusion, Justice Field held that ‘psychiatric injury’ was caused to C by one of the alleged incidents.⁹⁴ In accordance with these cases, it appears more warranted to place the legal focus upon ‘the nature and extent of the mental distress actually suffered by the plaintiff’ instead of ‘whether a clinician would attach a particular diagnostic label to the plaintiff’s condition’.⁹⁵

Secondly, the categorical employment of recognised psychiatric illness as the threshold of damage may result in problems with regard to foreseeability. In cases regarding mental harm, it is likely for a wrongdoer to foresee that his or her conduct would bring about some mental harm; but it is extremely difficult, if not impossible, for him or her to envisage that a particular type of recognised psychiatric illness will be caused. This problem appears in cases of both intentional and negligent infliction of mental harm.⁹⁶ Tellingly, as analysed in Chapter 3,⁹⁷ the majority of the Supreme Court in *Rhodes* in a sense solved this conundrum, but only in relation to this tort, by reformulating the object of intention as ‘at least severe mental or emotional distress’.⁹⁸ Whilst maintaining recognised psychiatric illness as the required consequence element, they drew a ‘loose analogy’ with the “egg shell skull” doctrine,⁹⁹ which allowed

Nelson.

⁹² *C v D, SBA* (n 33) at para 95 per Justice Field.

⁹³ *ibid* at para 96 per Justice Field.

⁹⁴ *ibid* at para 98 per Justice Field.

⁹⁵ *Giller v Procopets* [2008] VSCA 236 at para 31 per Maxwell P. This is an important Australian authority in relation to the *Wilkinson* tort.

⁹⁶ ‘...while it should be possible to demonstrate that mental harm was a reasonably foreseeable result of the intentional conduct, it would seem inordinately difficult for a plaintiff to have to establish that “a psychiatrically cognizable injury” was foreseeable’. See *ibid* at para 20 per Maxwell P. Also see *van Soest v Residual Health Management Unit* (n 66) at para 100 per Thomas J. ‘A negligent wrongdoer may be able to reasonably foresee mental and emotional harm to a third person; he or she will not contemplate a particular or any psychiatric illness.’

⁹⁷ See Chapter 3, section 3.22.

⁹⁸ *Rhodes v OPO* (n 34) at para 88 per Lady Hale and Lord Toulson.

⁹⁹ *ibid* at para 87 per Lady Hale and Lord Toulson.

them to bypass the question as to whether a certain recognised psychiatric illness could be foreseen. Nevertheless, this conundrum still remains in the field of negligently caused psychiatric injury.

Thirdly, as discussed in previous sections, recognised psychiatric illness, as the currently adopted threshold and control device, in some situations might exclude pursuers who suffer from mental harm (or significant emotional distress), which not only deviates from normal or trivial emotions, but also brings with it debilitating and lasting effects. This exclusion, without solid and cogent justification, may create the problem of under-compensation, particularly when compared with the recoverability of relatively moderate physical injury under current law. The patients afflicted with ‘partial’ or ‘subsyndromal’ PTSD (Posttraumatic Stress Disorder), as mentioned in section 4.2222, exemplify this problem. Psychological research probing the distinction between partial PTSD and full PTSD revealed that in terms of the ‘average number of impairment days in the 30-day period when the respondents were most upset by the traumatic events’¹⁰⁰...‘the full PTSD group exceeded significantly the partial PTSD group on all impairment indicators’.¹⁰¹ Nevertheless, the results also signified that ‘the partial PTSD group was significantly more impaired than the group with neither PTSD nor partial PTSD’.¹⁰² On the basis of this research, it seems evident that these people afflicted by partial PTSD lead a far-from-normal life, and suffer from non-trivial distress, pain and sorrow. In other words, they can be taken as affected by mental harm (in the sense suggested in this chapter). However, as recognised psychiatric illness, rather than mental harm, is the prevalently accepted criterion in the courts, compensation would not be awarded to this group of people without the recognised ‘label’. Considering that these patients with ‘partial’ PTSD may in fact suffer from functional impairment, difficulties and ‘decreased quality of life’,¹⁰³ significant

¹⁰⁰ N Breslau, VC Lucia and GC Davis, ‘Partial PTSD Versus Full PTSD: An Empirical Examination of Associated Impairment’ (2004) 34 Psychol Med 1205 at 1208.

¹⁰¹ *ibid*.

¹⁰² See *ibid* at 1208 as well as Table 2 and Table 3 at 1209.

¹⁰³ ‘A number of studies have found more pervasive functional impairment among individuals with partial PTSD relative to traumatized individuals without PTSD...these studies are important because they show that partial PTSD is associated with increased burden and decreased quality of life’. See P Schnurr, ‘A Guide to the Literature on Partial PTSD’ (2014) 25 PTSD RQ 1 at 2.

health-related disability, and even suicidal thoughts and attempts,¹⁰⁴ it seems unjustifiable that their claim for recovery should be rejected, whilst those suffering from relatively moderate physical harm can be compensated.¹⁰⁵ An inconsistency between the legal treatment of mental and physical harm seems to occur therefrom.¹⁰⁶ It is arguable therefore that a problem of under-compensation arises in respect of partial PTSD, due to the categorical insistence upon the label of recognised psychiatric illness.

For these reasons, though the threshold of recognised psychiatric illness may function appropriately in many cases, the insistence upon it without any exception may bring about problems and inconsistencies. Also, it appears more sensible to place the legal focus upon the nature and extent of the mental harm at issue, rather than on the question of whether a particular recognised label can be assigned. Teff, for example, remarked that '[t]he law does not have to confine redress for mental harm to conditions that constitute a "recognisable psychiatric illness"',¹⁰⁷ suggesting that this traditional threshold could be replaced by 'moderately severe mental or emotional harm'.¹⁰⁸ In a similar vein, Mulheron has called the threshold of recognised psychiatric illness into question, and argued that it would be preferable 'to do away with the Traditional Rule altogether, so as to allow the lower threshold of "grievous mental harm" for *all* cases in which the claimant is attempting to prove that he or she suffered pure mental harm...'.¹⁰⁹ Although she was writing primarily about negligence, Mulheron's arguments are of considerable interest. Taking into account the problems and

¹⁰⁴ Friedman, Keane and Resick (n 80) 31-32, and 541.

¹⁰⁵ Notably, an actionable physical (personal) injury should at least be 'more than negligible'. In *Dryden v Johnson Matthey Plc*, the core question considered by the Supreme Court was 'whether the appellants have suffered actionable personal injury on which they can found claims for negligence/breach of statutory duty'. After reviewing previous authorities in this regard (in particular *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 and *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281), Lady Black stated that an actionable personal (physical) injury should be 'more than negligible'. The appeal by the claimants was allowed, on the ground that the claimants had suffered from 'a change to their physiological make-up', which would make them 'los[e] part of their capacity to work' and should be taken as 'far from negligible'. See *Dryden v Johnson Matthey Plc* [2018] UKSC 18; [2018] 2 WLR 1109 at paras 1, 12, 25, 40, 47, 48, and 49 per Lady Black.

¹⁰⁶ 'Under the present law, there is an inconsistency between the treatment of very minor physical and mental injuries.' See Handford (n 56) para 6.40.

¹⁰⁷ Teff (n 4) 171.

¹⁰⁸ *ibid* 185.

¹⁰⁹ R Mulheron, 'Rewriting the Requirement for a "Recognized Psychiatric Injury" in Negligence Claims' (2012) 32 OJLS 77 at section 6.

inconsistencies arising from adopting the criterion of recognised psychiatric illness, these views are persuasive. The lowered thresholds which they advocate are consistent with the concept and boundary of mental harm canvassed in this Chapter. However, the question whether it is practically feasible to ‘do away with the Traditional Rule altogether’, to lower the threshold of compensable damage in both intentional cases and cases founded on negligence, will be examined after reviewing relevant English and Scots authority.

4.32 Review of case law and commentary

4.321 The measurability and recoverability of *parasitic or concomitant* emotional distress

One often-claimed reason for the irrecoverability of stand-alone mental harm or emotional distress is that they cannot be valued or assessed. However, ‘difficulty of valuation and assessment’ should not constitute a solid ground for denial, since there has never been any barrier to compensating mental harm or emotional distress which is concomitant with other wrongs.¹¹⁰ In *Rhodes v OPO* Lord Neuberger mentioned that ‘as is pointed out in *McGregor on Damages* (19th ed) (2014), paras 5-012 and 5-013, injury to feelings is taken into account when assessing general damages in claims, by way of example, for assault, invasion of privacy, malicious prosecution and defamation’.¹¹¹ Indeed, in typical sorts of assault cases, solatium would be available for the concomitant emotional distress or psychiatric illness.¹¹² It is also accepted that solatium for emotional distress can be taken into consideration as one of the main elements of damages in the law of defamation.¹¹³ In England the emotional distress must be derivative of or concomitant with ‘serious harm to the reputation of the

¹¹⁰ Handford (n 56) paras 6.50 and 6.70.

¹¹¹ *Rhodes v OPO* (n 34) at para 118 per Lord Neuberger.

¹¹² DM Walker, *The Law of Delict in Scotland* (2nd rev edn, 1981) 489. Also see E Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010) para 2.19.

¹¹³ A Mullis, R Parkes and C Gatley, *Gatley on Libel and Slander* (12th edn, 2013) para 9.4; as well as *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1125. Also see Reid (n 112) paras 10.62-10.63.

claimant'.¹¹⁴ Thus emotional distress and mental harm *are* capable of being assessed for the purposes of compensation. It is unclear why emotional distress and mental harm can be assessed and compensated where they are associated with injury to other protected interests or rights, but become unmeasurable and unrecoverable when they stand on their own.

4.322 Protection of mere distress as provided by the General Data Protection Regulation and the Data Protection Act 2018

On the protection of mere distress falling short of recognised psychiatric illness, some light has been shed by the EU General Data Protection Regulation (hereinafter GDPR) and the Data Protection Act 2018. According to Article 82(1) of the GDPR, 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.'¹¹⁵ Pursuant to its Recital 146, 'The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation.'¹¹⁶ In respect of the right to compensation for 'non-material damage' (as provided in Article 82 of the GDPR), it has been explicitly stipulated in the Data Protection Act 2018 under section 168(1), that "'non-material damage" includes distress'.¹¹⁷ Moreover, in regard to

¹¹⁴ According to the Defamation Act 2013 Section 1(1), in terms of personal defamation, 'A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant'. See Defamation Act 2013 s 1(1). With regard to serious harm to the 'reputation', the Scots position, by contrast, is rather different, in that communication to a third party is in principle not required. See *Ramsay v MacLay & Co* (1890) 18 R 130 at 133 per Lord Justice-Clerk; *Mackay v M'Cankie* (1883) 10 R 537 at 539 per Lord President; *Thomson v Kindell* 1910 2 SLT 442 at 444 per Lord Dewar. However, in its Report on *Defamation*, the Scottish Law Commission observed this traditional rule as 'antiquated' and 'being out of step with...other parts of the world'. It recommended that communication to 'someone other than the person who is the subject of it' should be a requisite of actionable defamation, as well as that a statutory threshold of 'serious harm to the reputation' should be introduced into the Scots law of defamation. See Scottish Law Commission, *Defamation* (Scot Law Com No 248, 2017) paras 2.4, 2.8, 2.12, and 2.14. Relevant analyses also see Chapter 2, section 2.2351.

¹¹⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119 Article 82(1).

¹¹⁶ See Recital 146 to *ibid*.

¹¹⁷ Data Protection Act 2018 s 168(1).

‘compensation for contravention of other data protection legislation’, the concept of damage also includes ‘damage not involving financial loss, such as distress’.¹¹⁸ In the light of the foregoing provisions, it seems clear that compensation can be granted for mere distress (falling short of recognised psychiatric illness or physical injury) on the basis of the GDPR and the Data Protection Act 2018.¹¹⁹ Noticeably, it may be difficult to decide whether the distress stated therein is truly *standing alone* or not. Although the claimants or pursuers may suffer *no other kinds* of damage apart from distress, it is nevertheless likely to regard them as having suffered some infringements of their right (to data protection).¹²⁰

4.323 The impact of the Protection from Harassment Act

In contrast with the general rule, the Protection from Harassment Act 1997 provides a possible remedy for (intentionally inflicted) mental harm, and even for mere anxiety or distress. In relation to Scotland, the Act provides that: ‘Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and (a) is intended to amount to harassment of that person; or (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.’¹²¹ The term ‘conduct’ includes ‘speech’, and ‘harassment’ encompasses ‘causing the person alarm or distress’.¹²² However, it should be borne in mind that ‘a course of conduct’ requires

¹¹⁸ *ibid* s 169(5).

¹¹⁹ It should be noted that, even in respect of the (now superseded) Data Protection Act 1998, after the judgments made in *Google Inc v Vidal-Hall*, ‘compensation would be recoverable under section 13(1) for *any* damage suffered as a result of a contravention by a data controller of any of the requirements of the DPA’. See *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 at para 105 per The Master of the Rolls and Lady Justice Sharp. In *Woolley v Akram*, a Scottish case where the pursuers merely suffered distress by virtue of the defender’s breach of the data protection principles (as contained in Schedule 1 to the Data Protection Act 1998), Sheriff Ross followed the reasoning of *Google Inc v Vidal-Hall*, holding that ‘[i]t has now been settled’, that compensation is available even for ‘distress only’. See *Woolley v Akram* [2017] SC EDIN 7 at paras 110-112 per Sheriff Ross.

¹²⁰ The ‘right to the protection of personal data’ is clearly recognised in the GDPR as a ‘fundamental right’, but not deemed to be an ‘absolute right’. See Recitals 1 and 4 to the GDPR.

¹²¹ Protection from Harassment Act 1997 s 8(1); see also s 1(1), in relation to England and Wales, the wording of which is slightly different from those of the former: ‘(1) A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other’.

¹²² *ibid* s 8(3); see also s 7(2), (4) in relation to England and Wales.

‘conduct on at least two occasions’,¹²³ save exceptions provided in section 8A(3)(b) for Scotland¹²⁴ and in section 7(3)(b) for England and Wales.¹²⁵ As to the civil remedy in an action of harassment, besides granting an interdict or injunction, the court may award damages which cover ‘any anxiety caused by the harassment’ and ‘any financial loss resulting from it’.¹²⁶

As a result, although the major aim of the Act is ‘prevention and protection rather than compensation’,¹²⁷ its provisions do make clear provision for recovery for anxiety or emotional distress falling short of recognised psychiatric illness. In order for the anxiety or emotional distress to be recovered on the basis of this Act, it has to be inflicted by conduct amounting to harassment on at least two occasions,¹²⁸ and the conduct constituting harassment must be ‘genuinely offensive and unacceptable behaviour’ rather than ‘ordinary banter and badinage of life’.¹²⁹ However, anxiety, alarm and distress are very broad notions, and the Act does not clarify whether they extend to every normal or trivial mental reaction such as unpleasantness, worry, uncomfortableness etc, or only to those which deviate from normal/trivial emotions and can be regarded as serious. In short, this Act in a sense admits the recoverability of anxiety, emotional distress or mental harm, but only if the restrictive conditions stipulated in it have been met, including, very importantly, the requirement that harassment should have been constituted by a course of conduct rather than a single incident.¹³⁰

¹²³ *ibid* s 8(3); see also s 7(3)(a) in relation to England and Wales.

¹²⁴ *ibid* s 8A(3)(b). In Scotland, where the disputed harassment constitutes ‘domestic abuse’, the required conduct ‘may involve behaviour on one or more than one occasion’.

¹²⁵ *ibid* s 7(3)(b). In England and Wales, according to section 7(3)(b), ‘in the case of conduct in relation to two or more persons (see section 1(1A))’, a course of conduct must involve ‘conduct on at least one occasion in relation to each of those persons’.

¹²⁶ *ibid* s 8(5), (6); see also s 3(2) in relation to England and Wales.

¹²⁷ *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at paras 65 and 67 per Baroness Hale of Richmond. See also T Lawson-Cruttenden and N Addison, *Blackstone's Guide to the Protection from Harassment Act 1997* (1997) 30. It is said that the focus of the court will be put upon the course of conduct which might be regarded as harassment, rather than upon the effect or the harm inflicted on the victim.

¹²⁸ Save in exceptional circumstances as provided in section 8A(3)(b) for Scotland and in section 7(3)(b) for England and Wales, as mentioned above.

¹²⁹ *Majrowski v Guy's and St Thomas's NHS Trust* (n 127) at para 66 per Baroness Hale of Richmond.

¹³⁰ Protection from Harassment Act 1997 s 8(3); see also s 7(3)(a) in relation to England and Wales. Exceptional circumstances see s 8A(3)(b) for Scotland and s 7(3)(b) for England and Wales.

4.324 Scottish Law Commission Report on *Damages for Psychiatric Injury*

Harassment aside, the Scottish Law Commission proposed in its Report on *Damages for Psychiatric Injury*, that a wrongdoer who intentionally causes mental harm should compensate his or her victim for any harm so inflicted: ‘In the case of intentional wrongdoing, we now think that the defender should normally be liable for the harm he intended to cause: this should include distress, anxiety, grief, anger etc, whether or not this amounts to a medically recognised mental disorder.’¹³¹ In contrast, mental harm inflicted negligently would not give rise to liability unless the mental harm met the requirement of a ‘medically recognised mental disorder’.¹³² On the face of it, the suggested reform would have lowered the traditional threshold of harm in intentional cases to any (kind or level of) emotional reaction. However, due to the general restrictions proposed in the Report, emotional reactions which ‘persons can reasonably expect to suffer in the course of their lives’ were to be sustained without seeking recovery.¹³³ As analysed in sections 4.212 and 4.221, these general restrictions are in line with the principle derived from the traditional distinction¹³⁴ – that normal emotions or ordinary conditions of life which people commonly experience and endure should not be compensated. And, arguably, the underlying ground for this principle could be an attempt to prevent *trivial* actions and to address the floodgates effect.¹³⁵ As a result, taking the scheme proposed in the Report as a whole, recovery for intentionally inflicted *normal* or *trivial* emotions would still have been excluded. Only the mental harm *deviating from normal or trivial emotions* would have been recoverable (when inflicted in an intentional manner).

¹³¹ Scottish Law Commission (n 1) para 3.7.

¹³² *ibid.*

¹³³ *ibid* para 3.30.

¹³⁴ The traditional distinction between mere emotional distress and recognised psychiatric illness in both negligent and intentional fields.

¹³⁵ Handford (n 56) para 6.50.

4.325 Cases regarding negligently caused mental harm derivative of injury to other interests

There are few authorities that explicitly address the recoverability of emotional distress or mental harm under the law of negligence. In addition, most of these authorities are related to mental harm/emotional distress *derivative of* or *concomitant with* injury to other interests. Since the focus here is upon *stand-alone* mental harm, these authorities may be of limited help. In *Rhodes v OPO* Lord Neuberger cited *Robinson v St Helens Metropolitan Borough Council* as having provided support for the view that ‘in some negligence cases, it appears that damages for distress falling short of psychiatric illness may be recoverable’.¹³⁶ In addition to *Robinson v St Helens Metropolitan Borough Council*, two cases argued in negligence – *Anderton v Clwyd County Council* and *Phelps v Hillingdon London Borough Council*, both cited in *Robinson* by Lord Justice Brooke, as well as a Scottish case *Holdich v Lothian Health Board* – seemed to speak to the loosening of the traditional prerequisite of recognised psychiatric illness. Whether or not they can really furnish some foundation for the compensability of negligently inflicted *pure* mental harm may require further examination.

In *Anderton v Clwyd County Council*, the appeal in which was conjoined with that in *Phelps v Hillingdon London Borough Council*,¹³⁷ and which is related to a failure to alleviate the adverse results of a congenital defect such as dyslexia, a diagnosis of recognisable psychiatric illness is absent.¹³⁸ Nevertheless, Lord Slynn of Hadley held that ‘[h]aving regard to the purpose of the provision it would in any event, in my view, be wrong to adopt an over-legalistic view of what are “personal injuries to a person”’. For the reasons given in my opinion in the *Phelps* case, psychological damage and a failure to diagnose a congenital condition and to take appropriate action as a result of which a child’s level of achievement is reduced (which leads to loss of employment and wages) may constitute damage for the purpose of a claim’.¹³⁹ This implied that

¹³⁶ *Rhodes v OPO* (n 34) at para 118 per Lord Neuberger.

¹³⁷ *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

¹³⁸ ‘Whether the effects of such failure sound in damages where there is no recognisable psychiatric condition’ is one of the crucial questions raised in this case. See *ibid* at 662 per Lord Slynn of Hadley.

¹³⁹ *ibid* at 664 per Lord Slynn of Hadley.

psychological damage falling short of recognised psychiatric illness, resulting from failure to take action, and other consequential losses, can still constitute damage or harm.

In *Robinson v St Helens Metropolitan Borough Council*, an English case regarding loss of the opportunity of academic achievement as well as loss of earnings due to the defendant's failure properly to investigate and treat the claimant's dyslexia, Lord Justice Brooke cited *Phelps v Hillingdon London Borough Council*, mentioning that in that case 'the duty identified by the House was a duty to take care in relation to the diagnosis of a particular kind of congenital condition. A negligent failure to diagnose this condition could foreseeably lead to damage in the sense of economic loss... and/or to damage in the sense of emotional or psychological harm which would usually fall short of developing into a recognisable psychiatric injury. This is the kind of damage which the duty exists to prevent'.¹⁴⁰ His Lordship clarified that in this context the House of Lords had decided that 'emotional or psychological harm falling short of a positive psychiatric injury could be properly categorised as constituting "impairment to a person's mental condition"'.¹⁴¹ Accordingly the trial judge in *Robinson* had been wrong, just as the Court of Appeal in *Anderton v Clwyd County Council*, 'to hold that the foreseeable psychological harm caused to a dyslexic claimant following a negligent misdiagnosis of his condition could not amount to a "personal injury" (within the statutory definition) unless it developed into a recognisable psychiatric illness'.¹⁴²

In *Holdich v Lothian Health Board*, a Scottish Outer House case pertinent to damaged sperm samples and the pursuer's loss of a chance of fatherhood due to the malfunction of defender's storage facility, Lord Stewart raised the question as regards the threshold for actionable delictual mental harm, and advised that '[i]t has been doubted whether in Scots law, in spite of *dicta* to the contrary, there is a threshold for actionable mental injury in delict: but in any event I think it is reasonably clear that the judicial outlook is now sufficiently flexible to recognise that distress can be the precursor of more

¹⁴⁰ *Robinson v St Helens Metropolitan Borough Council* [2002] EWCA Civ 1099 at para 36 per Lord Justice Brooke.

¹⁴¹ *ibid* at para 37 per Lord Justice Brooke.

¹⁴² *ibid* at para 39 per Lord Justice Brooke.

serious mental symptoms. Where the line is to be drawn between distress and mental illness “is a matter for trial”. Distress by itself may be compensable where *professional* negligence is proved...Accordingly I must conclude that the pursuer’s averments about “irritability, tearfulness, negative ruminations and distress” preceding “a depressive disorder” are not so obviously irrelevant that they should be excluded from probation, even assuming the claim is one only for damages in delict’.¹⁴³ In accordance with this paragraph, Lord Stewart appeared to deny that recognised psychiatric illness is the absolute threshold, and to allow that the distinction between distress and recognised psychiatric illness should be a matter of degree rather than kind.

These cases in a sense appeared to accept, or at least did not reject the notion, that emotional distress or psychological harm/damage falling short of recognised psychiatric illness could be compensable. In *Anderton v Clwyd County Council* and *Robinson v St Helens Metropolitan Borough Council*,¹⁴⁴ rather than mere emotional distress, the adopted terms for compensable harm were ‘psychological damage’¹⁴⁵ and ‘emotional or psychological harm’.¹⁴⁶ In addition, this ‘emotional or psychological harm’ was interpreted as something constituting ‘impairment to a person’s mental condition’,¹⁴⁷ which to some extent reflects the principle of *deviation from normal mental status or trivial emotions of the victim* and the concept of mental harm proposed by this thesis.¹⁴⁸ Lastly, in *Holdich v Lothian Health Board* the pursuer claimed for ‘mental injury consequential on property damage in breach of contract’, or separately for “pure” mental injury in delict’, or alternatively for ‘damage to sperm’ *sui generis* with ensuing mental injury on the ground of fault at common law.¹⁴⁹ In order to determine whether the averments of pursuer were relevant for proof, Lord Stewart doubted whether in Scots law ‘there is a threshold for

¹⁴³ *Holdich v Lothian Health Board* 2014 SLT 495 at para 98 per Lord Stewart.

¹⁴⁴ For discussion of cases in relation to failure of education authorities to ameliorate specific learning defects, see D Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 MLR 59 at 80-86.

¹⁴⁵ *Phelps v Hillingdon London Borough Council* (n 137) at 664 per Lord Slynn of Hadley.

¹⁴⁶ *Robinson v St Helens Metropolitan Borough Council* (n 140) at para 37 per Lord Justice Brooke.

¹⁴⁷ *ibid.*

¹⁴⁸ See section 4.22 of this chapter.

¹⁴⁹ *Holdich v Lothian Health Board* (n 143) at para 4 per Lord Stewart. See also *Yearworth v North Bristol NHS Trust* [2010] QB 1. This case was discussed in *Holdich* and involving emotional distress resulting from the destruction of semen samples negligently stored by the defendants.

actionable mental injury in delict’¹⁵⁰ and stated that ‘distress by itself may be compensable where *professional negligence* is proved’.¹⁵¹

Admittedly, although these authorities shed some light upon the concept of mental harm as well as the compensability of mental harm or emotional distress, they do not furnish solid bases for loosening the traditional prerequisite in cases regarding negligently caused *pure* mental harm. Mental harm or emotional distress was not the sole concern of these cases. In the first two cases, besides the suffered emotional or psychological harm, loss of chances of achieving academic success, loss of employment and wages, or loss of earnings were also important issues. In the last case, though one count of claims is presented for *pure* mental injury, Lord Stewart did not seem to regard the mental injury at issue as *pure*.¹⁵² As regards other counts of claim, destruction of property and loss of reproductive autonomy were also claimed in addition to mental injury. Thus the mental injury claimed should be read as ‘consequent’ or ‘consequential’ on other kinds of damage.¹⁵³ In other words, in these cases the psychological harm or emotional distress suffered should be regarded as *concomitant*, rather than *stand-alone*.

In sum, the cases discussed above are helpful to the discussion of recovery for mental harm or emotional distress falling short of recognised psychiatric illness. However, they do not provide cogent authority in relation to negligently inflicted pure (or stand-alone) mental harm or emotional distress, which occurs in isolation rather than as concomitant with harm to any other protected rights or interests.

4.326 Cases founding upon intentional wrongdoing

There is (admittedly limited) case law indicating that recoverability of emotional distress should be approached differently in intentional cases as compared with those

¹⁵⁰ *Holdich v Lothian Health Board* (n 143) at para 98 per Lord Stewart.

¹⁵¹ *ibid*.

¹⁵² See *ibid* at paras 89-90 per Lord Stewart.

¹⁵³ *ibid* at paras 4 and 90 per Lord Stewart.

founding upon negligence. In *D v National Society for the Prevention of Cruelty to Children*, it was observed in the Court of Appeal that emotional distress might be actionable where it was inflicted by means of a false statement made knowingly, intentionally and without just cause or excuse.¹⁵⁴ In this case the appellants had been informed of the ill-treatment of a 14-month-girl and had sent an inspector to visit the parents in order to investigate. Afterwards the mother claimed damages for personal injury, alleging that through the manner and circumstances of the investigation she had suffered severe shock and depression including suicidal tendencies and continuing insomnia.¹⁵⁵ The case came before the House of Lords on the question of the confidentiality of the sources used by the NSPCC, and, overturning the decision of the Court of Appeal, their Lordships ruled that anonymity should be preserved. However, in the Court of Appeal Lord Denning had commented *obiter*: ‘I would like to say that if the claim against the society were to succeed, it would only be done by making a considerable extension of the present law. The leading case is *Wilkinson v. Downton* [1897] 2 Q.B. 57... That was followed and approved in *Janvier v. Sweeney* [1919] 2 K.B. 316,... I can understand those cases. They show that where a false statement is made knowingly and intentionally without just cause or excuse and when it causes emotional distress, it may give rise to a cause of action. But it is a big step forward - or backward - to extend it to a statement which is made honestly in good faith’.¹⁵⁶ These words indicate the view that, irrespective of whether emotional distress inflicted through honest and truthful statements can be actionable, *emotional distress caused by a false statement made knowingly and intentionally without just cause or excuse* should be actionable.

Two decades later in *Ward v Scotrail Railways Ltd*, a Scots Outer House case pled in negligence, there are dicta to suggest that deliberately caused fear, alarm and emotional distress falling short of recognisable psychiatric illness might be considered as recoverable, whilst those generated by negligence are not.¹⁵⁷ In this case, Lord

¹⁵⁴ *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 188-189 per Lord Denning.

¹⁵⁵ *ibid* at 175.

¹⁵⁶ *ibid* at 188-189 per Lord Denning.

¹⁵⁷ *Ward v Scotrail Railways Ltd* (n 24) at 259-260 per Lord Reed.

Reed appeared to approve of the submission by the counsel for the pursuer, that ‘damages are recoverable for conduct which deliberately causes fear and alarm, even in the absence of personal injury: damages are recoverable in respect of the affront’,¹⁵⁸ on the basis of that ‘[t]his submission appears to be supported by authorities concerned with assaults and threatening behaviour (see Walker, *Law of Damages in Scotland*, p 555).’¹⁵⁹ In contrast, Lord Reed took the view that emotional distress without recognisable psychiatric illness is not actionable or recoverable in cases founding upon negligence.¹⁶⁰ Thus it seems that Lord Reed accepted that approaches to recovery for intentionally and negligently caused emotional distress could be differentiated. Nevertheless, this point was not taken further in the case in hand since the pleadings had been based upon negligence rather than upon intentional wrongdoing.¹⁶¹

Lord Hoffmann in *Hunter v Canary Wharf Ltd* advised that the policy considerations regarding a tort of intention and actions founding upon negligence are considerably different.¹⁶² He saw ‘no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence’.¹⁶³ Subsequently in *Wainwright v Home Office*, Lord Hoffmann expanded this reasoning and added that ‘[i]f someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation.’¹⁶⁴ But imputed intention would not suffice: ‘[t]he defendant must actually have acted in a way which he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not.’¹⁶⁵ However, Lord Hoffmann reserved his opinion as to whether recovery could

¹⁵⁸ *ibid* at 259 per Lord Reed.

¹⁵⁹ *ibid*. But see Reid (n 112) para 2.20. Reid argued that, despite Walker’s having provided some authorities as well as hypothetical instances, ‘[t]here are no findings of assault on the basis of soiled towels or other affronts to dignity without the presence of some element of contact or threatened physical danger’... ‘It is doubtful therefore whether the modern Scots authorities on assault would support a claim for affront where the pursuer has not also been hurt (in terms of physical or psychiatric injury) or threatened...’.

¹⁶⁰ *Ward v Scotrail Railways Ltd* (n 24) at 259-260 per Lord Reed.

¹⁶¹ *ibid* at 259 per Lord Reed.

¹⁶² *Hunter v Canary Wharf Ltd* [1997] AC 655 at 707 per Lord Hoffmann.

¹⁶³ *ibid*.

¹⁶⁴ *Wainwright v Home Office* (n 32) at para 44 per Lord Hoffmann.

¹⁶⁵ *ibid* at para 45 per Lord Hoffmann.

be granted for *distress* inflicted by a genuine intention,¹⁶⁶ and in any event the required element of intention had not been fully established in the case in hand.¹⁶⁷

In *Rhodes v OPO*, Lord Neuberger suggested that under specific circumstances recognised psychiatric illness was not an indispensable element of the *Wilkinson v Downton* tort.¹⁶⁸ The specific circumstances included unjustified or gratuitous wrongdoing directed at the victim, and an intention to bring about severe or significant emotional distress.¹⁶⁹ In contrast to Lord Neuberger's approach, the majority of the Supreme Court, when restating the requirements of this tort, retained 'recognised psychiatric illness' (or 'physical harm') as the *consequence* element.¹⁷⁰ It is possible that the majority persisted with the notion of 'recognised psychiatric illness' because this injects some measure of certainty in terms of the threshold of compensable damage. However, the claimant in this case sought only an injunction to prohibit the questioned publication,¹⁷¹ rather than compensation for harm (which had not yet been suffered). As a result the threshold of compensable damage (the consequence element) was not in serious contention.

Lord Neuberger further took the view that:

‘As I see it, therefore, there is plainly a powerful case for saying that, in relation to the instant tort, liability for distressing statements, where intent to cause distress is an essential ingredient, it should be enough for the claimant to establish that he suffered significant distress as a result of the defendant's statement. It is not entirely easy to see why, if an intention to cause the claimant significant distress is an ingredient of the tort and is enough to establish the tort in principle, the claimant should have to establish that he suffered something more serious than significant distress before he can recover any compensation.

¹⁶⁶ *ibid* at para 46 per Lord Hoffmann.

¹⁶⁷ *ibid* at para 47 per Lord Hoffmann. But see *ibid* at para 61 per Lord Scott of Foscote: ‘And the absence of any possible justification for the handling of Alan's penis allows the inference to be drawn that it was a form of bullying, done with the intention to humiliate.’

¹⁶⁸ *Rhodes v OPO* (n 34) at para 119 per Lord Neuberger.

¹⁶⁹ *ibid* at para 122 per Lord Neuberger.

¹⁷⁰ *ibid* at para 88 per Lady Hale and Lord Toulson.

¹⁷¹ *ibid* at paras 17 and 21 per Lady Hale and Lord Toulson.

Further, the narrow restrictions on the tort should ensure that it is rarely invoked anyway.’¹⁷²

These remarks were obiter, and not supported by the majority. Nonetheless, they do admit the possibility that significant distress inflicted intentionally under specific circumstances could become a compensable harm. In terms of the degree of distress, it ‘must be significant, and not trivial, and it can amount to feelings such as despair, misery, terror, fear or even serious worry. But it plainly does not have to amount to a recognised psychiatric disease’.¹⁷³ These observations may be read as an attempt to relax the current threshold of compensable damage. And as they differentiate significant distress from recognised psychiatric illness as well as from mere emotional distress, they lend support to the concept of mental harm proposed in this thesis as deserving of compensation, or at least imply the practicability of recognising it as such.

4.33 Concluding Discussions

4.331 The conundrum raised by the traditional threshold and the potential solution

What light does the above review of English and Scots authorities shed on the question whether the threshold of compensable damage – i.e. recognised psychiatric illness – can be lowered in cases regarding both intentional and negligent infliction of mental harm? First of all, it is not credible to deny the recoverability of mental harm or emotional distress on the basis of the difficulty of its assessment and valuation. Secondly, although some of the negligence cases reviewed above appear to admit, or at least not to reject, the compensability of emotional distress or mental harm falling short of recognised labels, what was at issue in those cases was largely *concomitant* or *derivative* mental harm or emotional distress. As a result, these authorities cannot be taken as cogent authority in relation to negligently inflicted *pure* mental harm. Thirdly, some of the authorities reviewed did lend support for the practicability of

¹⁷² *ibid* at para 119 per Lord Neuberger.

¹⁷³ *ibid* at para 114 per Lord Neuberger.

compensating mental harm or (severe/significant) emotional distress, where it is inflicted intentionally in the absence of justification or excuse. It is also clearly arguable that intentional and negligent wrongdoing should be differentiated in respect of the basis and extent of liability.¹⁷⁴

It also appears that judicial support (in England and Scotland) is lacking as regards lowering the traditional threshold of compensable damage in negligently caused mental harm cases. Among the authorities cited by Mulheron (as supporting a lowered threshold in negligence cases), only one English case and one Scottish case can be found.¹⁷⁵ The Scottish case is *McLelland v Greater Glasgow Health Board*.¹⁷⁶ Yet, as discussed in section 4.223 above, although this case offers helpful perspectives as to theoretical scope for the concept of mental harm, it involves wrongful birth and cannot be considered as a *stand-alone* mental harm case.¹⁷⁷ As to the English case cited, *Hussain v Chief Constable of West Mercia Constabulary*,¹⁷⁸ it pertains to misfeasance in public office, which is an ‘intentional tort of considerable gravity’.¹⁷⁹ In this case, Kay LJ stated that ‘[w]hilst it is entirely appropriate to deny actionability where the non-physical consequences are trivial... it is important not to set the bar too high... For my part, I would not wish to shut out a claimant who has the robustness to avert recognized psychiatric illness but who nevertheless foreseeably suffers a grievous non-physical reaction as a consequence of the misfeasance’.¹⁸⁰ He also explicitly acknowledged ‘[i]f my approach does not live easily with the established approach in cases of negligence resulting in personal injury, I would strive to treat

¹⁷⁴ As Lord Hoffmann reasoned in *Hunter v Canary Wharf Ltd*, and again in *Wainwright v Home Office*, the policy considerations that constrain compensation for mere distress, inconvenience or discomfort in actions based on negligence are quite different from those applicable to the intentional torts. See *Hunter v Canary Wharf Ltd* (n 162) at 707 per Lord Hoffmann; *Wainwright v Home Office* (n 32) at para 44 per Lord Hoffmann. Similarly, the Scottish Law Commission maintained that separate treatment of intentional and unintentional wrongdoing should be ‘consonant with the different ways that the two types of wrongful conduct are treated under the general law of delict’. See Scottish Law Commission (n 1) para 3.7. In *Rhodes v OPO*, the majority of Supreme Court also recognised that ‘[i]n any event negligence and intent are very different fault elements and there are principled reasons for differentiating between the bases (and possible extent) of liability for causing personal injury in either case.’ See *Rhodes v OPO* (n 34) at para 63 per Lady Hale and Lord Toulson.

¹⁷⁵ Mulheron (n 109) at section 4 A.

¹⁷⁶ *McLelland v Greater Glasgow Health Board* (n 84).

¹⁷⁷ See discussion in section 4.223.

¹⁷⁸ *Hussain v Chief Constable of West Mercia Constabulary* [2008] EWCA Civ 1205.

¹⁷⁹ *ibid* at para 20 per Kay LJ.

¹⁸⁰ *ibid*.

misfeasance in public office exceptionally.’¹⁸¹ In other words, these comments expressly envisage relaxation of the threshold of compensable damage in intentional cases, but not in negligence.

It must certainly be recognised that the problems and inconsistencies arising from the insistence upon the threshold of recognised psychiatric illness, as analysed in 4.31, have great impact upon negligence cases as well as intentional.¹⁸² A useful illustration can be found in *Saadati v Moorhead*,¹⁸³ a Canadian Supreme Court case decided in 2017 which was pertinent to negligently caused (stand-alone) mental injury,¹⁸⁴ the Canadian Supreme Court explicitly held that the compensable mental injury need not amount to recognised psychiatric illness. As long as the inflicted mental disturbance is ‘serious and prolonged’ and ‘ris[ing] above the ordinary emotional disturbances’, it can qualify as (compensable) ‘mental injury’.¹⁸⁵ In other words, in order to establish a ‘mental injury’, the claimant’s task is to prove the ‘requisite degree of disturbance’ instead of ‘its classification as a recognized psychiatric illness’.¹⁸⁶ Likewise, the focus of the court should be placed upon the ‘level of harm that the claimant’s particular symptoms represent’, rather than on ‘whether a label could be attached to them’.¹⁸⁷ This Canadian decision convincingly pointed out the problems of (categorically) adopting recognised psychiatric illness as the legal threshold of damage,¹⁸⁸ rendering

¹⁸¹ *ibid.*

¹⁸² For in-depth analysis see Mulheron (n 109) at section 3. See also L Belanger-Hardy, ‘Reconsidering the Recognizable Psychiatric Illness Requirement in Canadian Negligence Law’ (2013) 38 *Queen’s LJ* 583; L Belanger-Hardy, ‘Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis’ (2013) 36 *Dalhousie LJ* 103.

¹⁸³ *Saadati v Moorhead* 2017 SCC 28.

¹⁸⁴ Following a road traffic accident, the appellant suffered from mental injury (including personality change and cognitive difficulties) without any physical injury or recognised psychiatric illness. He sued the respondents for ‘non-pecuniary loss’ and ‘past income loss’ on the basis of negligence. The claim for ‘past income loss’ was struck out by the trial court. Although the respondents ‘admitted liability for the accident’, they argued that no damage had been caused to the appellant, since no ‘medically recognized psychiatric or psychological illness or condition’ had been established. See *ibid* at paras 3-8 per Brown J.

¹⁸⁵ *ibid* at paras 19 and 21 per Brown J.

¹⁸⁶ *ibid* at para 37 per Brown J.

¹⁸⁷ *ibid* at para 31 per Brown J.

¹⁸⁸ Recognised psychiatric illness should not be taken as an indispensable threshold, since ‘there is no necessary relationship between reasonably foreseeable mental injury and a diagnostic classification scheme’. Moreover, psychiatric diagnosis could be contentious even among psychiatric experts, and the reference criteria (as DSM or ICD) are continuously ‘to be revised to reflect evolving psychiatric consensus’. In terms of avoiding possible flood-gate effects, recognised psychiatric illness is not a necessary control-device because ‘the elements of the cause of action of negligence’ have already

the relaxation of the traditional threshold in negligence cases a more likely choice. It remains to be seen whether the reasoning applied in this decision will be considered in the English or Scottish courts. Despite dealing with *negligently* caused (stand-alone) mental injury, the Canadian Supreme Court's approach – highlighting the 'degree' or 'level', rather than the 'label', of the emotional disturbance when considering its compensability – is plainly also relevant to this tort.

Nonetheless, in England and in Scotland judicial support for lowering the traditional threshold has been found only in relation to intentional cases, and numerous dicta differentiate between intentional and negligent infliction of mental harm. Because intention as the foundation of delictual liability is much stronger than negligence, it can function as a makeweight, or a justification, for awarding compensation for sorts of harm which would otherwise be unrecoverable.¹⁸⁹ There is likely to be little enthusiasm therefore for lowering the traditional threshold for *both* intentional *and* negligent infliction of mental harm. Accordingly, the question whether the traditional threshold should be relaxed in negligence cases, as well as whether the existing control devices within the law of negligence are sufficient to ring-fence trivial and unmeritorious suits, are not taken further here and are in any event beyond the ambit of this thesis. The important point to emerge from the above survey of authority is that there is a degree of support for the relaxation of traditional threshold in cases of intentional infliction of (stand-alone) mental harm.

The relaxation of the threshold of recognised psychiatric illness in intentional cases would not necessarily trigger an unmanageable number of claims. First of all, people who suffer from trivial emotional distress seldom have the incentive to initiate law

provided 'principled and sufficient barriers' – such as 'duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage' – to prevent trivial or unworthy claims. See *ibid* at paras 19, 21, 31 and 32 per Brown J.

¹⁸⁹ P Cane, 'Mens Rea in Tort Law' (2000) 20 OJLS 533 at 546. According to Cane, the functions of tortious intention can be divided into the independent function and the ancillary one. The former is defined as serving 'to justify causes of action where none would exist in the absence of intention' or 'to justify imposing tort liability for types of harm which would not otherwise be actionable', whilst the latter is construed as 'to justify the awarding of remedies which would not be available in the absence of intention'. See 545-548. See also E Reid, "'That Unhappy Expression': Malice at the Margins' in SGA Pitel, JW Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 441 at 451-452.

suits, since the prospective compensation would be moderate.¹⁹⁰ Secondly, a relaxation of the traditional threshold does not mean that any slight emotional reaction can be recovered in the future. The question as to what constitutes the lowered threshold of compensable damage will be discussed in the following section. Thirdly, the other elements of this tort are not easily satisfied, which means that there are effective alternative control devices.¹⁹¹ As analysed in Chapter 2, after reviewing the line of *Wilkinson* authorities, although ‘extreme and outrageous’ is not a requirement for the conduct element employed in *Rhodes v OPO*,¹⁹² the previously actionable patterns of behaviour generally share the character of being *grave* instead of being commonplace. In other words, it is *not* simply any kind of infliction of mental harm that can constitute the necessary conduct element in this tort. Moreover, as explored in Chapter 3, the mental element of this tort should encompass the notion of intention based upon purpose (ends or means) as well as intention based upon knowledge (foresight with substantial certainty), with recklessness excluded. Both of these elements, arguably, furnish challenging hurdles for the potential claimants to surmount. Thus, even if the threshold of recognised psychiatric illness is relaxed, other elements of this tort can still serve to prevent a possible flood-gate effect.

4.332 *Simply* mental harm or *severe/significant* emotional distress as the lowered threshold of compensable damage

In the authorities on intentional wrongdoing reviewed above, both *emotional distress* and *distress in a more serious sense* have been proposed in connection with lowering the threshold of compensable damage. In practice, the notion of emotional distress has not been fully clarified. As regards *stand-alone* emotional distress, recovery has been mostly denied, whilst reparation is granted without demur for *concomitant or parasitic*

¹⁹⁰ ‘Because people do not often go to the trouble of bringing actions to recover damages for trivial injuries...’. See *Grieves v F T Everard & Sons* [2007] UKHL 39; [2008] 1 AC 281 at para 8 per Lord Hoffmann. Although this case does not involve intentional infliction of mental harm, Lord Hoffmann’s reasoning is of general application.

¹⁹¹ ‘Further, the narrow restrictions on the tort should ensure that it is rarely invoked anyway.’ See *Rhodes v OPO* (n 34) at para 119 per Lord Neuberger.

¹⁹² ‘...the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse...’. See *ibid* at para 88 per Lady Hale and Lord Toulson.

emotional distress.¹⁹³ In fact emotional distress is a broad and overarching notion, as discussed in section 4.223, encompassing all types of emotional reactions ranging from the slightest to the very serious. This inclusive nature may explain why it is difficult to regard emotional distress as universally recoverable or irrecoverable. Arguably, in order for emotional distress, in particular *stand-alone* distress, to be compensable, some considerable measure of severity is required. The main reason is that *not* every mental reaction, including transient and trivial upsets, slight anger or unpleasantness, should be deemed as *harm* to mental tranquility/integrity. An emotional reaction which does not deviate from trivial emotions or impair the victim's normal condition cannot be labelled as *harm* and need not be compensated.¹⁹⁴ Therefore, in comparison with mere (trivial) emotional distress, *severe or significant distress* is more capable of reflecting this *deviation* as well as mirroring the concept of *mental harm*.

Parallel approaches or terminologies can be identified in some authorities regarding intentional wrongdoing, such as *Rhodes v OPO*,¹⁹⁵ the above-mentioned *Hussain v Chief Constable of West Mercia Constabulary*¹⁹⁶ and a South-African case, *Boswell v Minister of Police*.¹⁹⁷ The adoption of *severe or significant emotional distress (or simply mental harm)* would be compatible with the consequence element as analysed by Lord Neuberger in *Rhodes v OPO*.¹⁹⁸ In *Hussain v Chief Constable of West Mercia Constabulary*, Kay LJ observed that claimants suffering from 'grievous non-physical reaction' which is not trivial should not be excluded from action or reparation.¹⁹⁹ In *Boswell v Minister of Police*, due to the defendant's intentional, unlawful and erroneous report of his having shot and killed her nephew, the plaintiff suffered a shock, collapsed and lost consciousness, continuing to be weak for several weeks.²⁰⁰ Kannemeyer J regarded her suffering as being a 'substantial effect on her

¹⁹³ See section 4.321 of this chapter.

¹⁹⁴ With regard to normal or trivial emotions and the deviation from them, see discussion in section 4.221.

¹⁹⁵ *Rhodes v OPO* (n 34).

¹⁹⁶ *Hussain v Chief Constable of West Mercia Constabulary* (n 178).

¹⁹⁷ *Boswell v Minister of Police* 1978 (3) SA 268 (E).

¹⁹⁸ See discussion in section 4.326.

¹⁹⁹ *Hussain v Chief Constable of West Mercia Constabulary* (n 178) at para 20 per Kay LJ.

²⁰⁰ *Boswell v Minister of Police* (n 197) at 271-272 per Kannemeyer J.

health’, rather than something of a ‘trifling or passing’ nature,²⁰¹ and accordingly granted her compensation.²⁰² Despite dealing with negligent rather than intentional wrongdoing, in *Saadati v Moorhead* as discussed above, the Canadian Supreme Court held that the mental disturbance at issue could qualify as (compensable) ‘mental injury’ as long as it was ‘serious and prolonged’ and ‘ris[ing] above the ordinary emotional disturbances’.²⁰³

Furthermore, employing *severe or significant emotional distress (or simply mental harm)* as the lowered threshold of compensable damage is consistent with the views expressed by many academic commentators. Keating regarded emotional *harm* as something ‘we either cannot or should not steel ourselves against’,²⁰⁴ and *not* something ‘people should be expected to master or to suffer uncomplainingly’.²⁰⁵ Teff explicitly put forward ‘moderately severe mental or emotional harm’ as his proposed threshold of liability.²⁰⁶ Mulheron (admittedly writing specifically in relation to negligence) similarly argued that though it may be justifiable to remove the traditional requirement of recognised psychiatric illness, it was not her contention that ‘all those who suffer transient or trivial mental distress should recover at law’.²⁰⁷ Relaxing the more exacting threshold for actionable damage does not necessarily bring with it the acceptance of minor and transient upsets as an injury.²⁰⁸ As the lowered threshold she proposed ‘grievous mental injury/harm’.²⁰⁹ This would filter out minor and transient emotional reactions, as well as signifying some measure of severity of the mental suffering. Likewise, Belanger-Hardy, who also has written in relation to negligent infliction of mental harm, endorsed the threshold based upon ‘no compensation for mere upsets’.²¹⁰

²⁰¹ *ibid* at 273 per Kannemeyer J.

²⁰² *ibid* at 275 per Kannemeyer J.

²⁰³ *Saadati v Moorhead* (n 183) at paras 19 and 40 per Brown J.

²⁰⁴ Keating (n 58) at 301.

²⁰⁵ *ibid* at 303.

²⁰⁶ Teff (n 4) 185.

²⁰⁷ Mulheron (n 109) at section 4 B.

²⁰⁸ *ibid* at section 5.

²⁰⁹ *ibid* at sections 5 and 6.

²¹⁰ Belanger-Hardy, ‘Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis’ (n 182) at 134; Belanger-Hardy, ‘Reconsidering the Recognizable Psychiatric Illness Requirement in Canadian Negligence Law’ (n 182) at 616.

With the help of professional psychiatric assessments, the courts should be able to distinguish mere emotional distress (normal or trivial emotions) from severe or significant distress constituting mental harm.²¹¹ Mulheron has pointed out that medical science has made substantial progress in terms of helping the courts ‘to decide whether the necessary threshold of “mental injury” has been met’.²¹² Likewise, in *van Soest v Residual Health Management Unit* Thomas J argued that ‘[f]aced with a claim for mental or emotional harm today the Courts can be informed by the expert opinion of modern medical knowledge’²¹³ ... ‘The question whether the plaintiff’s mental illness, although not commanding a psychiatric label, is plainly outside the range of ordinary human experience in the sense that I have described would still be subject to expert medical evidence, and it is no different in kind or in difficulty than any number of questions which are regularly resolved in the Courts.’²¹⁴ Although *van Soest v Residual Health Management Unit* was in fact a medical negligence case,²¹⁵ these comments nevertheless hold good for mental distress/harm intentionally inflicted.

In making this assessment, apart from drawing upon expert opinions, courts can also take into consideration the criteria prevalently employed in the field of ‘Abnormal Psychology’, namely the ‘four Ds’, which are of help as a basis to determine whether there exists mental harm, as well as to clarify the boundary between ‘normal’ and ‘abnormal’²¹⁶ emotions. The classic patterns of psychological abnormality are Deviance, Distress, Dysfunction, and Danger, which are exemplified in some of cases reviewed in relation to this tort, as follows.

²¹¹ See Diagram 1 in 4.221; Diagram 2 in 4.222.

²¹² See Mulheron (n 109) at section 4 B.

²¹³ *van Soest v Residual Health Management Unit* (n 66) at para 103 per Thomas J.

²¹⁴ *ibid* at para 106 per Thomas J. In this case, Thomas J proposed a review of the existing law, including the relaxation of the threshold of recognisable psychiatric illness. As long as the suffered mental harm is ‘plainly outside the range of ordinary human experience’, the possibility of recovery should not be excluded. However, this proposal did not have the support of the majority. See paras 83, 107, 120, 121.

²¹⁵ *ibid* at paras 2 and 8 per Blanchard J.

²¹⁶ RJ Comer and JS Comer, *Abnormal Psychology* (10th edn, 2018) 2.

1) Deviance:

Deviance denotes the obvious incompatibility of the pursuer's emotions, thoughts and behaviour with social norms and culture in relation to psychological functioning.²¹⁷ In the case discussed above, *C v D, SBA*, Justice Field did not consider C as having suffered from ASPD ('Anti-social Personality Disorder').²¹⁸ Accordingly, he did not attach any recognised label to the mental harm/illness complained of by C. Nevertheless, he held that 'psychiatric injury' was caused to C on the basis of C's suffering from 'mental abnormality as distinct from emotional distress'.²¹⁹ Among C's established symptoms/suffering which constituted this 'mental abnormality', one pivotal aspect was that he became a person who 'behav[es] badly in a general way' – e.g. 'set[ting] off fireworks in the street to wake everyone up', beginning to take drugs, drink heavily, and get involved into fights.²²⁰ Moreover, he 'continues to have a deep mistrust of persons in authority' and 'has great difficulty in inter-personal relationships', being 'callous and uncaring to others' and 'isolated from his peer group'.²²¹ These features of his behaviour or personality may properly be seen as meeting the criterion of 'deviance'.

2) Distress:

Moreover, before emotions, behaviour and ideas can be categorised as abnormal they have to generate distress.²²² Instances of distress can be observed in almost every case with regard to mental harm. A Canadian (Labour Arbitration Board) case, *Pacific Press v CEP, Local 115-M*, can be taken as an example. It should be emphasised that in Canada the commonly accepted consequence element of this tort (the *Wilkinson* tort or the tort of intentional infliction of mental distress/harm/suffering) is 'actual harm' or 'visible and provable illness' instead of 'recognised psychiatric illness'.²²³ In this

²¹⁷ *ibid* 3.

²¹⁸ *C v D, SBA* (n 33) at paras 96 and 95 per Justice Field.

²¹⁹ *ibid* at paras 98 and 96 per Justice Field.

²²⁰ *ibid* at para 17 per Justice Field.

²²¹ *ibid* at para 96 per Justice Field.

²²² Comer and Comer (n 216) 4.

²²³ *Rahemtulla v Vanfed Credit Union* [1984] 3 WWR 296 at para 57 per McLachlin J; *Prinzo v Baycrest Centre for Geriatric Care* [2002] OJ No 2712 at paras 43 and 46 per Weiler JA; *Pacific*

case, having regard to the fact that the grievor already had a history of psychiatric illness, and that the intentional conduct on the part of the employer aggravated her depression and pain,²²⁴ it was held that the ‘severe emotional stress’ inflicted upon her could be taken as ‘actual harm’ or ‘provable illness’.²²⁵ The symptoms constituting ‘severe emotional stress/distress’ encompassed ‘high levels of stress’ which exacerbated her back and neck pain,²²⁶ and for several months being ‘stressful’, ‘constantly in tears’, ‘fretful’, ‘withdrawn’, ‘angry’, and ‘frustrated’.²²⁷ On several occasions her husband had to ‘console her for lengthy periods to prevent her from requiring hospitalization’.²²⁸ It is evident from these descriptions that, for mental suffering to be regarded as ‘severe emotional stress (distress)’, both the *seriousness* as well as the *duration* of the suffering are important factors to be considered.

3) Dysfunction:

Dysfunction signifies a common feature of abnormal emotions, ideas or behaviour, interfering with individuals’ capacity to function, and hindering them from participating in ordinary activities, work or interpersonal interactions.²²⁹ In the significant Canadian case in relation to this tort, *Rahemtulla v Vanfed Credit Union*, despite the fact that ‘expert medical evidence’ was absent in the proceedings – in other words, no label of recognised psychiatric illness had been ascribed to the plaintiff, McLachlin J found that the plaintiff ‘suffered depression accompanied by symptoms of physical illness’ which could constitute ‘visible and provable illness’.²³⁰ However, in the following paragraph and in her conclusion, McLachlin J clearly stated that damages were awarded for the ‘mental distress’ suffered by the plaintiff, which was ‘of a serious magnitude’.²³¹ The ‘severe emotional distress’ established included conditions or symptoms like ‘refus[ing] to eat to the point where she fainted and

Press v C E P, Local 115-M 52 CLAS 427 at para 100 per Bruce.

²²⁴ *Pacific Press v C E P, Local 115-M* (n 223) at para 101 per Bruce.

²²⁵ *ibid* at para 100 per Bruce.

²²⁶ *ibid* at para 39 per Bruce.

²²⁷ *ibid* at paras 45 and 46 per Bruce.

²²⁸ *ibid* at para 46 per Bruce.

²²⁹ Comer and Comer (n 216) 4.

²³⁰ *Rahemtulla v Vanfed Credit Union* (n 223) at para 57 per McLachlin J.

²³¹ *ibid* at paras 59 and 60 per McLachlin J.

ambulances had to be called’, ‘suffer[ing] severe depression’, ‘chang[ing] from a happy, outgoing, affectionate person to a gloomy person subject to outbursts of temper’, ‘not leaving the house and doing very little’ for approximately a month.²³² Among these symptoms, locking oneself in the house and doing virtually nothing for a long period of time can be seen as exemplifying the criterion of ‘Dysfunction’.

4) Danger:

Danger, although more contentious, is usually referred to as a feature of abnormal psychological functioning, in the sense that their emotions, ideas and behaviour turn out to be dangerous to the individuals themselves or to others.²³³ In a Canadian case, *Boothman v R*, where the plaintiff’s preexistent emotional vulnerability was exploited by her supervisor, damages was awarded for her severe emotional distress or mental suffering/breakdown inflicted thereby.²³⁴ Apart from other established symptoms, the plaintiff also presented ‘suicidal feelings’ and ‘overwhelming feelings of wanting to die’.²³⁵ In the English case already considered in connection with ‘Deviance’, *C v D, SBA*, C also made several attempts to commit suicide.²³⁶ These examples signify the presence of ‘Danger’.

In addition to the above- cases, as analysed in section 4.31, patients with ‘partial’ PTSD can be deemed as affected by mental harm (in the sense adopted in this chapter), since they suffer from non-trivial distress and lead a far-from-normal life. The commonly identified symptoms of ‘partial’ PTSD encompass ‘decreased quality of life’,²³⁷ functional impairment or great health-related disability, even suicidal thoughts and attempts.²³⁸ Obviously these symptoms also reflect the criteria of ‘Distress’, ‘Dysfunction’, and ‘Danger’.

²³² *ibid* at para 6 per McLachlin J.

²³³ *Comer and Comer* (n 216) 4.

²³⁴ *Boothman v R* [1993] 3 FC 381 at paras 106 and 116 per Noël J. Particularly at para 116, ‘The cases of *Wilkinson*, *Rahemtulla* and *Timmermans* involved intentional torts and, in each case, damages were awarded for psychological or emotional distress similar to that from which the plaintiff suffers.’

²³⁵ *ibid* at para 81(c), 88, and 93 per Noël J.

²³⁶ *C v D, SBA* (n 33) at paras 14 and 24 per Justice Field.

²³⁷ See *Schnurr* (n 103) at 2.

²³⁸ *Friedman, Keane and Resick* (n 80) 31-32, and 541.

In sum, it is undeniable that the nature of mental harm or the boundary between normality and abnormality is sometimes elusive rather than absolutely precise.²³⁹ However, the criteria of ‘Deviance’, ‘Distress’, ‘Dysfunction’, and ‘Danger’ as exemplified above may serve as a starting point, in combination with professional medical assessments, for the courts to form their decisions. Observed from the above cases (used as examples), the criteria of ‘Distress’ and ‘Dysfunction’ seem to be the fundamental components of ‘mental harm (abnormality)’ or ‘severe emotional distress’, since they are features shared in most of the cases. The presence of ‘Deviance’ and ‘Danger’ can be seen as factors which reinforce the finding of mental harm (abnormality) or severe emotional distress.

4.4 Conclusion

This chapter has argued that the boundary of actionable mental harm should be determined by reference to *deviation from normal or trivial emotions*. It is possible and practicable for mental harm to be recognised as setting in at a level between recognised psychiatric illness and mere emotional distress. The problems and inconsistencies arising from the categorical adoption of recognised psychiatric illness as the threshold of compensable damage have been explored in this chapter, drawing upon existing case law and academic commentary. Ultimately it would be desirable to address those problems in relation to both intentionally and negligently caused injury. The focus of this thesis is, however, intentional infliction of mental harm, and it is therefore left to others to address this future issue in the law of negligence. It is proposed here that the threshold of recognised psychiatric illness should be relaxed in cases regarding intentional infliction of (stand-alone) mental harm. The concepts of ‘mental harm’ or ‘severe/significant emotional distress’ can adequately denote the lowered threshold of compensable damage. For a mental condition to be regarded as ‘mental harm’ or ‘severe/significant emotional distress’, apart from its being serious and prolonged, the criteria of ‘Deviance’, ‘Distress’, ‘Dysfunction’, and ‘Danger’ can

²³⁹ Comer and Comer (n 216) 4-5.

be taken into consideration in combination with professional medical assessments.

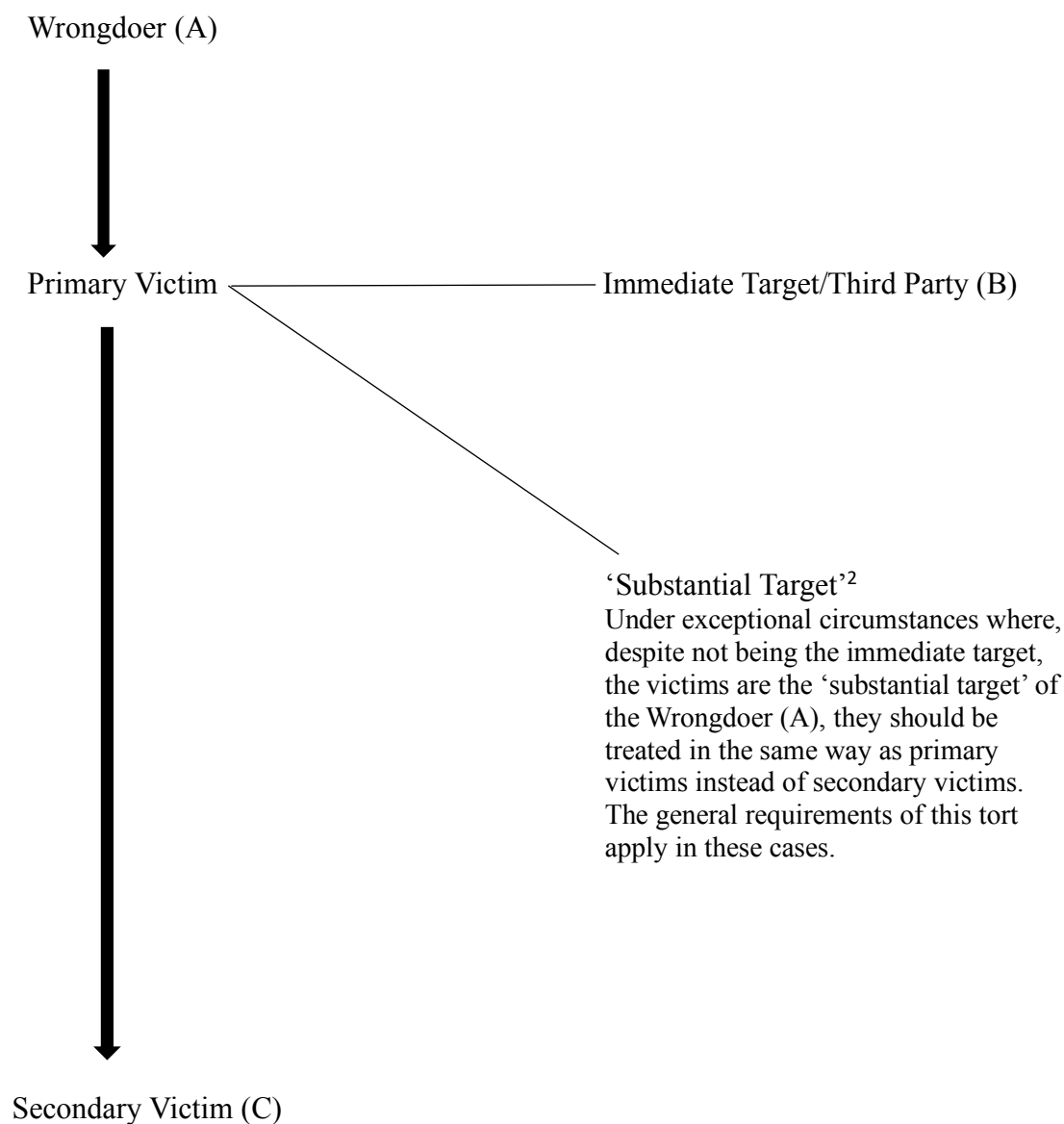
Chapter 5 Secondary Victims in the Field of Intentional Infliction of Mental Harm

The pivotal issues to be investigated in this chapter revolve around secondary victims in the realm of intentional infliction of mental harm. First it will be argued that secondary victims, whose mental harm is inflicted intentionally rather than negligently, should be entitled to a claim based upon this tort. Thereafter the prerequisites of this sort of claim will be explored in sections concerning, respectively, the conduct element, the mental element, and the consequence element of the tort. The last part of this chapter will argue that the prerequisites suggested, in particular in regard to the mental element, can adequately ring-fence liability for secondary victims in this intentional field. It should also be noted that the limitations or factors as regards proximity employed in negligent cases remain important considerations in respect of this tort, although they need not be adopted as categorical limitations, as discussed further below.

5.1 Introduction

This chapter explores a distinctive category of intentional infliction of mental harm. As illustrated in the following diagram, a third party who is the immediate target of the wrongdoer is always involved. The circumstances can be depicted as follows. First of all, a third party (B) is required, who is the immediate target of the wrongdoer (A) and directly harmed by A's wrongdoing. The wrongdoing at issue is intentional, directed at the third party (B) and occasioning physical or mental harm to him or her. Secondly, the wrongdoer (A), by means of the intentional infliction of harm upon the third party/immediate target (B), causes mental harm to (C) *in an indirect but*

intentional manner.¹ The mental harm of (C) arises as a result of his or her perception of the physical injury or mental harm suffered by the third party (B).



Mental harm is caused to (C) through his or her perception of injury inflicted on (B). This category of cases is the focus of this chapter.

¹ Questions as to the meaning of intention/intentional, and what follows if the mental harm were inflicted through an unintended manner, will be analysed later in section 5.42.

² Several cases regarding victims who are 'substantial target' of the wrongdoer will be analysed in section 5.41 – 5.412.

These circumstances appear to parallel the classification of secondary victims in the law of negligence, since the infliction of mental harm upon (C) could be taken as incidental or secondary to the causation of injury to (B) – the third party who is the immediate target. The distinction between secondary and primary victims plays a significant role in cases involving negligently caused psychiatric injury, as summarised below. For the sake of systematic coherence, the possibility of adopting a parallel distinction in the realm of intentional infliction of mental harm should be considered. The core questions to be answered in this chapter are: 1) Can secondary victims have a claim based upon (the tort of) intentional infliction of mental harm? 2) If the answer to the first question is yes, what are the requisite elements of this type of tort? 3) Can the requisite elements properly ring-fence potential claims raised by secondary victims?

5.11 The distinction between secondary and primary victims in the realm of negligently caused psychiatric injury

As is well-known, the leading case in which the House of Lords distinguished primary and secondary victims is *Alcock v Chief Constable of South Yorkshire Police*.³ In *Alcock*, Lord Oliver differentiated victims who are ‘involved, either mediately or immediately, as a participant’ from those who are ‘no more than the passive and unwilling witness of injury caused to others’.⁴ Plaintiffs who are placed in fear for their own safety can similarly be labeled as primary victims. In *Page v Smith*, Lord Lloyd defined secondary victim as someone ‘in the position of a spectator or bystander’, whilst describing primary victim as ‘participant’ who is ‘directly involved in the accident’ and ‘within the range of foreseeable physical injury’.⁵ Treating the

³ Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) para 2.53; Scottish Law Commission, *Damages for Psychiatric Injury* (Scot Law Com No 196, 2004) para 2.6. More in-depth exploration of the distinction between primary and secondary victims, see R Mulheron, ‘The “Primary Victim” in Psychiatric Illness Claims: Reworking the “Patchwork Quilt”’ (2008) 19 KLJ 81; F Leverick, ‘Counting the Ways of Becoming a Primary Victim: *Anderson v Christian Salvesen Plc*’ (2007) 11 EdinLR 258.

⁴ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver.

⁵ *Page v Smith* [1996] AC 155 at 184 per Lord Lloyd.

categories reflected in *Alcock* and *Page* as ‘settled for the time being’,⁶ in *White (Frost) v Chief Constable of South Yorkshire Police* Lord Steyn considered the ‘limitation of actual or apprehended dangers’ as a threshold test (for primary victim), even for a plaintiff who seeks recovery as a *rescuer*.⁷ Similarly, in a House of Lords case pertinent to pleural plaques and psychiatric illness caused by the fear for future disease, *Rothwell v Chemical and Insulating Company Ltd*, Lord Hope revisited the boundary between primary and secondary victims and confirmed that the former category was ‘confined to persons who suffer psychiatric injury caused by fear or distress resulting from involvement in an accident caused by the defendant’s negligence or its immediate aftermath’.⁸ A further, and more controversial, subcategory of primary victims relates to those placed by the defendant in a position whereby they consider themselves as having been ‘the involuntary cause of another’s death or injury’, and as such ‘an unwilling participant in the event’.⁹ In *W v Essex County Council*, Lord Slynn reaffirmed that people who ‘have a feeling of responsibility’ for others’ injury can possibly be taken as primary victims,¹⁰ despite their having not been subjected to any risk of physical injury.¹¹

The concept of primary victim is thus relatively fluid. A primary victim is a participant directly involved in the wrongdoing/accident. It may also encompass those ‘within the range of foreseeable physical injury (or danger)’, or, more unusually, those who found themselves the ‘unwitting cause’ of the accident to another. By contrast, the category of secondary victim relates to those who are non-participants in a wrongdoing/accident, but who are merely witnesses, spectators or bystanders. However, as Lord Slynn remarked in *W v Essex County Council*, the ‘categorisation

⁶ *White (Frost) v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 500 per Lord Steyn.

⁷ *ibid* at 499 per Lord Steyn.

⁸ *Rothwell v Chemical and Insulating Company Ltd* [2007] UKHL 39; [2008] 1 AC 281 at para 54 per Lord Hope.

⁹ *Alcock v Chief Constable of South Yorkshire Police* (n 4) at 407-408 per Lord Oliver.

¹⁰ *W v Essex County Council* [2001] 2 AC 592 at 601 per Lord Slynn.

¹¹ Parallel dicta can be seen in a Scottish case *Anderson v Christian Salvesen Plc* 2006 SLT 815. This case was classified by Lord Drummond Young, at paras 8-9, as a typical ‘instrumentality’ case, which ‘has been recognised as giving rise to recoverable loss’ in respect of psychiatric injury. This type of case arises ‘where the pursuer has been instrumental in another person’s death, or possibly serious injury, and that has caused him psychiatric harm’. See also *Salter v U B Frozen & Chilled Foods Ltd* 2004 SC 233.

of those claiming to be included as primary or secondary victims' is not finally closed, and may potentially be further developed in accordance with diverse factual circumstances.¹²

5.12 A parallel distinction between secondary and primary victims in the field of intentional infliction of mental harm

The distinction between secondary and primary victims has not been explored in the line of *Wilkinson v Downton* authorities. Reference may be made to analysis in negligence cases, but without doubt the framework found there cannot be directly copied by their intentional counterparts, owing to their different features. For instance, the requirement of 'within the range of foreseeable physical injury (or danger)' is connected to the idea of duty of care, which is inappropriate in the context of intentional infliction of mental harm. However, some of the dicta reflecting the essential relationship between primary and secondary victims are capable of application to both negligent and intentional infliction of mental harm – for example, the separation of 'direct' from 'indirect' involvement, as well as the division between 'participant' and 'bystander/witness'.

The factual matrix is less challenging where the victim is the immediate target at which the intentional wrongdoing is directed, or is harmed directly by the intentional wrongdoer. However, it is more problematic where the 'victim' is *not* the target towards which the intentional conduct of the wrongdoer is directed, since this implies the existence of a different person, a third party, at whom the wrongdoing is aimed.¹³ As illustrated in the foregoing diagram, the intentional wrongdoing takes place between the wrongdoer (A) and the third party/immediate target (B). Since 'victim' (C) is *not directly involved*, her mental harm, if any, should result from her perception of what happened in the primary process, being *incidental* and *secondary* to the injury

¹² *W v Essex County Council* (n 10) at 601 per Lord Slynn.

¹³ In most of the cases, an intentional wrongdoing would have a (immediate) target. This target can be an object, an animal, a person, a group of people, or even the society or the country, which or who can be wronged and harmed in a direct manner by commission of the intentional wrongdoing.

inflicted upon the third party (B). Accordingly, (C)'s position as a victim is *secondary* to the position of the third party (B). It seems that even in the realm of intentional infliction of mental harm, the boundary between primary and secondary victims can be drawn with the help of the afore-mentioned divisions between 'direct' and 'indirect' involvement, as well as between 'participant' and 'bystander/witness'. In this regard, the primary victim could be defined as one who is *directly involved, directly harmed, or at whom* the wrongdoing on the part of the wrongdoer is *directed*. In contrast, the secondary victim could be identified as one who is *not directly involved* in the (primary) wrongdoing, who is *not a participant but merely a witness, indirectly injured* as a result of his or her perception of the offence as well as the injury inflicted upon the primary victim.

In the absence of English or Scots authority directly in point, the feasibility of this proposed distinction between primary and secondary victims in respect of intentional infliction of mental harm will be probed below by analysing case law from other jurisdictions. The three essential questions of this chapter will then be addressed.

5.2 Review of relevant decisions

The classic example of cases within this category is the infliction of mental harm upon the claimant or pursuer (the secondary victim), by means of intentionally causing serious physical harm (such as intentional murder, mutilation, sexual abuse, or assault) to his/her close family in his/her presence.¹⁴ Although this type of scenario has not hitherto figured in English or Scots case law, in *Rhodes v OPO* the terminology 'directed at' was used, which might be taken as indicating an awareness, even approval, of the difference between conduct *directed at* the pursuer and that which is not. In *Rhodes*, Lady Hale and Lord Toulson canvassed the requisite elements of the *Wilkinson* tort, among which the conduct element requires 'words or conduct *directed towards/at* the claimant for which there is no justification or excuse'.¹⁵ Accordingly,

¹⁴ For parallel instances see Restatement (Third) of Torts §46 (2012) Comment m.

¹⁵ *Rhodes v OPO* [2015] UKSC 32; [2016] AC 219 at paras 74 and 88 per Lady Hale and Lord

it seems that victims injured *indirectly* would have *no* case on the basis of *Wilkinson v Downton*. Nonetheless, given the absence of English authority directly in point, and the fact that the circumstances of *Rhodes v OPO* had no bearing on secondary/indirectly injured victims, this requirement should not be construed as an attempt to exclude recovery for secondary victims. Rather, it reflected the fact that during the evolutionary history of the *Wilkinson* tort in England, issues revolving around secondary victims had seldom, if ever, been taken into account. The requirement of conduct ‘directed at’ the victim is better interpreted as the prerequisite of general cases of the *Wilkinson* tort, in which the victims are predominantly primary victims. Scope may well remain for secondary victims to recover, if a deserving case appears at some point in the future. In a sense the employment of the wordings ‘words or conduct “directed at” the claimant’ suggests the relevance of differentiation between directly and indirectly injured victims.

In the meantime, case law from other jurisdictions sheds light on the status of secondary victims of this tort. In an Australian case, *Johnson v The Commonwealth*, the defendants in an intentional and unjustifiable manner ‘assaulted the plaintiff’s husband in her presence’.¹⁶ The wrongdoing was committed in the residence where the plaintiff lived together with her husband. In addition to the assault, the defendants ‘forcibly removed him therefrom, and kept him imprisoned for a long time’.¹⁷ Having witnessed all this at the scene, the plaintiff suffered mental harm which also developed into physical illness.¹⁸ Ferguson J held that mental harm (‘nervous shock’) and the ensuing physical illness could ‘fairly and reasonably have been anticipated’ as a result of ‘the assault committed upon her husband in her presence’, which gave rise to a ‘good cause of action’.¹⁹ It should be noted that, in terms of the mental state on the part of the defendant, the court in this case merely required *anticipation or foreseeability*. The target/object to be foreseen appeared to encompass both mental harm and physical illness.

Toulson.

¹⁶ *Johnson v The Commonwealth* (1927) 27 SR (NSW) 133 at 135 per Ferguson J.

¹⁷ *ibid*.

¹⁸ *ibid*.

¹⁹ *ibid* at 137 per Ferguson J.

In *Purdy v Woznesensky*, a Canadian case, out of personal resentment at a dance the defendant struck the husband (male plaintiff) ‘two severe blows on the head’, ‘knocking him down’ and subjecting him to momentary unconsciousness in the presence of the wife (female plaintiff).²⁰ The wife witnessed this scene, screaming in a hysterical way, and falling down ‘in a state of collapse’.²¹ Due to this shock she suffered permanent injury to her nervous system.²² Citing *Wilkinson v Downton*, *Bielitski v Obadiak*²³ as well as other authorities,²⁴ Mackenzie JA held that by making the wife view his intentional and violent attack upon her husband, the wrongdoer should have foreseen that he could ‘upset her nervous system in such a way as to cause her some physical harm’.²⁵ Nevertheless he proceeded to perpetrate this wrongdoing and neglected ‘her legal right to maintain the safety and integrity of her person’. ‘An intention to produce such an effect’ as well as a ‘breach of duty’ was found accordingly.²⁶ Though an intention (to inflict mental harm as well as physical harm) towards the wife was imputed here, it was not clarified whether intention rested simply upon the idea of foreseeability, or whether other criteria were considered relevant.

These two cases share the common characteristic that the secondary victims were the wives of the primary victims, who were present at the scene observing the wrongdoing when it was being perpetrated. Yet there are situations where secondary victims might be absent from the scene but merely learn of what happened afterwards. An important case from the Supreme Court of South Australia, *Battista v Cooper*, is illuminating in this regard. Notably, this case was not founded upon the *Wilkinson v Downton* tort, but under the scheme of Criminal Injuries Compensation. However, in his arguments, Bray CJ took into consideration several cases in the *Wilkinson* category (such as *Bielitzki v Obadisk*,²⁷ *Stevenson v Basham*,²⁸ and *Janvier v Sweeney*), rendering this case of

²⁰ *Purdy v Woznesensky* [1937] 2 WWR 116 at para 1 per Mackenzie JA.

²¹ *ibid*.

²² *ibid* at para 2 per Mackenzie JA.

²³ *Bielitski v Obadiak* [1922] 65 DLR 627. The context of this case see Chapter 2, section 2.211.

²⁴ *Purdy v Woznesensky* (n 20) at paras 5-6 per Mackenzie JA.

²⁵ *ibid* at para 5 per Mackenzie JA.

²⁶ *ibid*.

²⁷ *Bielitski v Obadiak* (n 23).

²⁸ *Stevenson v Basham* [1922] NZLR 225. Relevant discussion about this case see section 5.412.

relevance here.²⁹ In this case, the husband of Mrs. Battista was murdered ‘in the course of a hold up of Mr. and Mrs. Battista in their shop and in the presence of Mrs. Battista’.³⁰ Some of the children who were not at the scene later witnessed ‘their father being admitted to hospital’. All of them suffered significant emotional distress in consequence of the tragedy that befell Mr. Battista.³¹ The court held that ‘an intentional tortfeasor is liable, not only for the injury caused directly to his victim, but to the injury indirectly caused to those connected with his victim or those witnessing the injury to the victim. I realise that the line must not be drawn too widely. Probably some element of foreseeability must still be present...’.³² From the perspective of Bray CJ, ‘all the applicants are entitled to recover under the Criminal Injuries Compensation Act for physical or mental injury caused to them by nervous shock or other emotional factors arising from their father’s murder’.³³

Likewise, in a more recent Australian case, from the Victoria Court of Appeal, the secondary victim, who was the brother and the son of the primary victims, was absent when the physical attacks were committed upon his family, but was informed afterwards. In *Carter v Walker*, the appellant Carter, a police officer, visited the residence of Donald Walker as a result of a call reporting a domestic dispute there.³⁴ During the investigation, at some point Marcia Walker, who was the mother of Donald Walker, also entered the house.³⁵ After her arrival, an altercation took place between the appellant and the respondents. Without justification, Carter deliberately exerted excessive force, striking Donald Walker a number of times and fracturing his ribs.³⁶ Moreover, he pushed Marcia Walker to the effect that she fell down to the floor, suffering a dislocated shoulder in consequence.³⁷ Marcus Walker, the brother of

²⁹ *Battista v Cooper* (1976) 14 SASR 225 at 229 per Bray CJ. For discussion see P Handford, *Tort Liability for Mental Harm* (3rd edn, 2017) para 30.280; J Fleming, *Fleming’s The Law of Torts* (C Sappideen and P Vines eds, 10th edn, 2011) 42-43.

³⁰ *Battista v Cooper* (n 29) at 226 per Bray CJ.

³¹ *ibid.*

³² *ibid* at 229 per Bray CJ.

³³ *ibid* at 230 per Bray CJ.

³⁴ *Carter v Walker* 2010 VSCA 340 at para 17 per Buchanan, Ashley and Weinberg JJA.

³⁵ *ibid* at para 21 per Buchanan, Ashley and Weinberg JJA.

³⁶ *ibid* at paras 26, 27, and 31 per Buchanan, Ashley and Weinberg JJA.

³⁷ *ibid* at para 28 per Buchanan, Ashley and Weinberg JJA.

Donald and the son of Marcia, was informed of the situation by his mother. When he arrived at the scene, he saw his mother ‘being put into an ambulance’, and learned of what had been done to his brother later.³⁸ As a result, Marcus suffered nervous shock. In addition to the claims regarding assault and battery initiated by his brother and mother,³⁹ Marcus Walker brought a ‘nervous shock claim’.⁴⁰ Although the specific cause of action had not been properly made clear,⁴¹ the court considered the applicability of battery,⁴² negligence,⁴³ and the *Wilkinson* tort,⁴⁴ as well as the relevance of the reasoning in *Battista v Cooper*.⁴⁵ All of these potential grounds of action were in the end dismissed.⁴⁶ Remarkably, the court regarded it as competent for the *Wilkinson* tort to extend to cases where the mental harm at issue is occasioned ‘in consequence of acts done to another (as well as words spoken) where there was actual or imputed intention to cause that consequence’.⁴⁷ Since this dictum explicitly required the mental state on the part of the wrongdoer towards the secondary victim to be an *intention*, anything less than that should not qualify. Although the *Wilkinson* tort may apply to cases regarding secondary victims, it cannot ‘extend to nervous shock suffered by a distant victim’,⁴⁸ who is *absent from the scene* while the wrongdoing is being committed.⁴⁹ This stance is at odds with the ruling of *Battista v Cooper*,⁵⁰ but remotely echoes an earlier Australian decision, *Bunyan v Jordan*, where a distant victim’s nervous shock claim, reliant both upon *Wilkinson v Downton* and negligence,

³⁸ *ibid* at paras 1 and 30 per Buchanan, Ashley and Weinberg JJA.

³⁹ *ibid* at paras 7 and 9 per Buchanan, Ashley and Weinberg JJA.

⁴⁰ *ibid* at para 7 per Buchanan, Ashley and Weinberg JJA.

⁴¹ *ibid* at paras 174 and 177 per Buchanan, Ashley and Weinberg JJA.

⁴² *ibid* at paras 214 to 226 per Buchanan, Ashley and Weinberg JJA.

⁴³ *ibid* at paras 247 to 250 per Buchanan, Ashley and Weinberg JJA.

⁴⁴ *ibid* at paras 252 to 271 per Buchanan, Ashley and Weinberg JJA.

⁴⁵ *ibid* at paras 227 to 246 per Buchanan, Ashley and Weinberg JJA.

⁴⁶ *ibid* at para 319 per Buchanan, Ashley and Weinberg JJA.

⁴⁷ *ibid* at para 263 per Buchanan, Ashley and Weinberg JJA.

⁴⁸ *ibid* at para 268 per Buchanan, Ashley and Weinberg JJA.

⁴⁹ The court reviewed *Stevenson v Basham* as well as *Bielitski v Obadiak*, regarding them as cases related to ‘recovery by a distant victim’, as well as ‘factual exception’. More importantly, the court held that the distant victims in these cases were actually those ‘within a group with whom the defendant had intended to communicate’. See *ibid* at paras 262 and 264 per Buchanan, Ashley and Weinberg JJA.

⁵⁰ ‘If *Battista* should be taken as affirming the availability of a *Wilkinson* cause of action in those circumstances, we respectfully consider that it should not be followed’. See *ibid* at para 267 per Buchanan, Ashley and Weinberg JJA. For commentary on *Carter v Walker*, see Handford (n 29) para 30.290; P Handford, ‘Battery, Traumatized Secondary Victims and *Wilkinson v Downton*’ (2012) 20 Tort L Rev 3.

was also rejected.⁵¹

The case law reviewed above provides important background for analysis of the central issues of this chapter.

5.3 Can secondary victims in the area of intentional infliction of mental harm have a claim?

The case law discussed above indicates that a distinction is to be drawn between *directly injured* and *indirectly injured* victims – between the victim at whom the wrongdoing is *directed*, and the victim in the position of *witness*, whose mental harm arises from his/her perception of the injury inflicted upon the direct victim. This distinction may serve to demarcate primary victims and secondary victims in the intentional realm. Moreover, the Commonwealth authority reviewed above seems to accept that compensation may be awarded to secondary victims whose mental harm is occasioned in an intentional manner by the wrongdoer. In the Canadian case of *Purdy v Woznesensky* the court found the existence of intention on the part of the wrongdoer towards the secondary victim,⁵² and regarded a claim to be competent in this kind of case. As regards the Australian cases, it was held in *Johnson v The Commonwealth* that mental harm as well as physical illness inflicted by virtue of ‘the assault committed upon her husband in her presence’ could provide the plaintiff with a ‘good cause of action’.⁵³ In *Battista v Cooper*, Bray CJ plainly acknowledged that an intentional wrongdoer should be held responsible for ‘the injury indirectly caused to those connected with his victim or those witnessing the injury to the victim’.⁵⁴ In

⁵¹ *Bunyan v Jordan* is a case where the plaintiff (appellant) suffered mental harm due to her overhearing that someone was likely to be shot at some point. However, she was neither at the scene nor in any relationship with the potential victim. In the end no one was actually shot as the defendant did not attempt to realise his words. Latham CJ analysed the causes of action including both the *Wilkinson v Downton* tort and negligence, finding that ‘[n]one of the cases has gone so far as to suggest that a man owes a duty to persons who merely happen to overhear statements that are not addressed to them’. See *Bunyan v Jordan* 57 CLR 1 (1937) at 6-11 per Latham CJ.

⁵² *Purdy v Woznesensky* (n 20) at para 5 per Mackenzie JA.

⁵³ *Johnson v The Commonwealth* (n 16) at 137 per Ferguson J.

⁵⁴ *Battista v Cooper* (n 29) at 229 per Bray CJ.

Carter v Walker, the possibility for the *Wilkinson* tort to extend to secondary victim cases was also recognised,⁵⁵ subject to the condition that the secondary victim at issue should not be a ‘distant victim’.⁵⁶

Likewise, the American Restatement (Third) of Torts §46 has explicitly recognised the applicability of this tort (intentional infliction of emotional harm) to secondary victims. The imposition of liability necessitates one of two sorts of mental status on the part of the wrongdoer towards the spectator or bystander: intention in the sense of knowledge/foresight of his/her conduct being ‘substantially certain to cause severe emotional harm’; or at least recklessness as regards the risk.⁵⁷ The severe emotional harm suffered by the secondary victims should be inflicted as a consequence of their perception of the ‘bodily or emotional harm to another’.⁵⁸

On this basis, a right to redress on the part of secondary victims in the field of intentional infliction of mental harm is warranted. This view is supported not only by case law and academic commentary from Australia and from Canada,⁵⁹ but also by the need for *systematic consistency*. Although cases of this kind are lacking in England and in Scotland, there are many secondary victim cases in the field of negligence. It seems illogical and incoherent, that a pursuer, as a secondary victim, may recover for mental harm caused by another’s negligence, but has no remedy at all when the mental harm in question is inflicted by intentional wrongdoing.

5.4 The prerequisites of this tort when claimed by secondary victims

If secondary victims are permitted to claim for intentional infliction of mental harm, what are the prerequisites of such a claim? Although *Rhodes v OPO* did not actually

⁵⁵ *Carter v Walker* (n 34) at para 263 per Buchanan, Ashley and Weinberg JJA.

⁵⁶ *ibid* at para 268 per Buchanan, Ashley and Weinberg JJA.

⁵⁷ Restatement (Third) of Torts §46 (2012) (n 14) Comment m.

⁵⁸ *ibid*.

⁵⁹ In addition to the above-reviewed case law, see also Handford (n 29) para 30.270; Fleming (n 29) 42.

touch upon the status of secondary victims, the framework⁶⁰ proposed by Lady Hale and Lord Toulson can still be taken as a general foundation for analysis. Accordingly, in this section the prerequisites of this tort (when claimed by secondary victims) will be examined in order of the ‘conduct element’, the ‘mental element’, and the ‘consequence element’.

5.41 The conduct element

5.411 In general

As demonstrated by the case law reviewed above, the conduct pattern of this type of tort is to inflict mental harm to the secondary victim through the causation of death or physical injury to the primary victim, who is a third party and the immediate target of the wrongdoer. In exceptional situations it may also be constituted by threatening the primary victim with serious violence⁶¹ or inflicting severe emotional distress upon the primary victim.⁶² Beyond that, the wrongdoer did nothing that was aimed at the secondary victim. The mental harm of the secondary victim arose in an indirect way, through her perception of the injury suffered by the primary victim. The mental harm at issue is taken as *inflicted by* the wrongdoer on the basis of the *mental status* on the part of the wrongdoer towards the secondary victim,⁶³ in combination with his deliberate offence done to the primary victim.

⁶⁰ *Rhodes v OPO* (n 15) at para 88 per Lady Hale and Lord Toulson.

⁶¹ For instance, in the knowledge of the presence of the child’s parents, a terrorist group threatens a child with terrible injury. In the absence of any actual consequence, this threat on its own may nevertheless be capable of inflicting significant emotional distress upon the parents who witness their child’s fear and suffering.

⁶² An illustration can be found in the commentary to the Restatement (Third) of Torts. A bridegroom-to-be of an engaged couple has been consumed with anger and jealousy over his bride’s earlier sexual affairs with another person, and all of a sudden decides to call off the ceremony in revenge. Through the unexpected cancellation his main purpose is to humiliate and to inflict severe mental harm upon the bride-to-be. He knows with clarity that his conduct is substantially certain to cause considerable mental suffering to her parents when they perceive what has been done to their daughter, as well as their daughter’s suffering. The bridegroom-to-be proceeds to commit this deliberate act, and although the parents are not his target they are nevertheless secondary victims. See Restatement (Third) of Torts §46 (2012) (n 14) Comment m Illustration 13.

⁶³ The requisite mental state on the part of the wrongdoer towards the secondary victim will be explored later.

5.412 A person who is a ‘substantial target’ of the wrongdoing should *not* be taken as a secondary victim

Secondary victims are to be regarded as such because the infliction of mental harm upon them is merely a *by-product*, which is incidental to the causation of harm to the primary victim. If, on the other hand, the conduct/wrongdoing at issue can be regarded as substantially directed towards the individual in question, treating him or her as a *substantial target*, it would deviate from the conduct pattern depicted here. In this situation, that individual should not be taken as a secondary victim. The claim brought by him or her should be processed in accordance with the requirements submitted in other chapters of this thesis in regard to primary victims.

For instance, in the Canadian case of *Butler v Newfoundland (Workers’ Compensation Commission)*,⁶⁴ the wrongdoing in question was seemingly directed at the second plaintiff (the wife) rather than the first plaintiff (Mr. Butler).⁶⁵ Russell J reasoned that recovery in respect of ‘intentional infliction of mental suffering’ should be allowed to the plaintiff ‘in a case where the conduct is directed towards a third party’.⁶⁶ Nonetheless, the first plaintiff (Mr. Butler) could be taken as a *substantial target* of the wrongdoing. Since the wife was in effect acting as the spokesperson for her husband, and the threat made by (the C.E.O. of) the defendant related to the future financial support for their family as a whole, the husband could be seen as *directly affected* by this wrongdoing rather than a mere *bystander*. Accordingly, the defendant’s wrongdoing in relation to Mr. Butler did not match the conduct pattern described above. Mr. Butler should be treated in the same way as primary victims instead of secondary victims.

Likewise, in *Stevenson v Basham*,⁶⁷ a New Zealand case, although the disputed

⁶⁴ The context of this case see discussion in Chapter 2, section 2.2232.

⁶⁵ See *Butler v Newfoundland (Workers’ Compensation Commission)* [1998] NJ No 190 at paras 77(3), 77(6), 79, 89, 91, 100 per Russell J.

⁶⁶ *ibid* at para 100 per Russell J.

⁶⁷ *Stevenson v Basham* (n 28). The facts are outlined at 227-228 per Herdman J. Stevenson (the wrongdoer/appellant) visited the house occupied by Mr. and Mrs. Basham, and made the threat at

conduct – a threat – was principally directed towards Mr. Basham, Mrs. Basham could be seen as a *substantial target*, since the wrongdoer was clearly aware of her presence inside the room. The wrongdoer proceeded to make the threat with the knowledge that his words would be heard by Mrs. Basham, and the threat (‘If I can’t get you out I’ll burn you out’) had the potential to inflict significant fear and emotional distress upon Mrs. Basham, or anyone residing in the house.⁶⁸ Accordingly, in spite of Mr. Basham being the immediate target and primary victim of the appellant’s wrongdoing, Mrs. Basham can be taken as the substantial target of the wrongdoing. Moreover, the significant distress and fright on the part of Mrs. Basham resulted from the disputed threat rather than her perception of any harm inflicted upon her husband.⁶⁹ She was not therefore to be treated as a secondary victim and the disputed wrongdoing in relation to her does not fit the conduct pattern depicted here (in section 5.411).

In a parallel fashion, if the very purpose of the causation of harm to the primary victim is to inflict mental harm upon the claimant, the claimant should not be treated as a secondary victim. In this kind of case, the causation of harm to the primary victim is not the actual aim of the wrongdoing, but merely employed as a means to achieve the goal. The infliction of mental harm on the claimant is not a by-product but the very goal of the wrongdoing.⁷⁰ Accordingly, the wrongdoing at issue should be regarded as (*substantially*) *directed at* the claimant, and this type of conduct should be differentiated from the conduct pattern of this section (as depicted in 5.411).⁷¹

issue in order to have the ‘possession of the premises be given to him’.

⁶⁸ Herdman J invoked the authorities of *Wilkinson v Downton* and *Janvier v Sweeney*, and held that Stevenson ‘intended to terrify the occupants of the house’. See *ibid* at 229 and 232 per Herdman J.

⁶⁹ *ibid* at 227 per Herdman J.

⁷⁰ For instance, ‘[t]here may be cases where the criminal intended to injure A psychologically by injuring B physically, e.g. assaulting a child with the intention of distressing the mother.’ See *Battista v Cooper* (n 29) at 228 per Bray CJ. Another example as suggested in Restatement (Third) of Torts §46 (2012) (n 14) Comment m Illustration 12, is mutilation of a son in order to cause mental harm to his father.

⁷¹ The distinction can also be observed in the commentary to the Restatement (Third) of Torts §46, which states that the limitations related to indirect or secondary victims as expressed in Comment m should not apply to cases where ‘an actor harms someone for the purpose of inflicting mental distress on another person’. See Restatement (Third) of Torts §46 (2012) (n 14) Comment m.

5.42 The mental element

5.421 The mental state on the part of the wrongdoer towards the primary victim

The mental element plays a pivotal role in this tort when liability is asserted by secondary victims, since it is closely related to the conduct element and has a direct bearing on whether this tort can be sufficiently circumscribed. In cases involving secondary victims, the intentional wrongdoing on the part of the wrongdoer has an impact upon both the primary victim and the secondary victim. As mentioned in the previous section, the conduct element entails that the wrongdoer has directed his or her actions towards the primary victim, making the primary victim the target of the conduct and causing the primary victim death or physical harm. Treating the primary victim as a target of the conduct seems to reveal the wrongdoer's mental status, suggesting that the wrongdoer committed the disputed wrongdoing *on purpose*. Indeed, in most of the cases, the infliction of death or physical harm upon the primary victim is *intentional* in the sense that it is *the very aim or purpose of the wrongdoer* in undertaking the wrongdoing, or at least *the means through which the wrongdoer can achieve his/her ultimate purpose*.⁷² In other words, as analysed in Chapter 3, the wrongdoer harbours an intention based upon purpose (or intention based on ends or means) towards the primary victim.⁷³ Notably, under certain circumstances, it is also likely for the wrongdoer to have an intention based upon knowledge (foresight with substantial certainty) towards (the injury inflicted upon) the primary victim.⁷⁴

5.422 The mental state on the part of the wrongdoer towards the secondary victim

In contrast, what sort of mental status is required in regard to the secondary victim when the wrongdoer is occasioning mental harm to the secondary victim through the

⁷² E.g., physically injuring a person in order to take revenge on him/her.

⁷³ See Chapter 3, section 3.3.

⁷⁴ E.g., although the ultimate purpose of a sexual offender is to fulfil his/her sexual desire rather than to harm, he/she knows with substantial certainty that the abuse would inflict physical as well as mental harm on the primary victim, and he/she proceeds to perpetrate the abuse. This level of intention will be further examined in the following section. See also Chapter 3, section 3.4.

primary wrongdoing? In the case law considered in section 5.2, ‘foreseeability’ as the mental state towards secondary victims was mentioned in *Johnson v The Commonwealth*⁷⁵ and *Battista v Cooper*.⁷⁶ In other words, the court considered whether, when carrying out the wrongdoing directed at the primary victim, the wrongdoer should/could have foreseen or anticipated that the secondary victim would thereby suffer psychiatric illness or physical harm. However, the major drawback of defining the requisite mental state by reference to ‘foreseeability’ is that it is likely to blur the boundaries of this type of tort, since foreseeability is a notion which is common to the concepts of intention, recklessness, and negligence.⁷⁷ Something more than mere foreseeability is needed, as was advised in *Carter v Walker*. According to the court in *Carter v Walker*, the *Wilkinson* tort can cover cases where the mental harm is inflicted ‘in consequence of acts done to another (as well as words spoken) where there was actual or imputed intention to cause that consequence’.⁷⁸ What actually counts as intention was not discussed in *Carter v Walker*, but some assistance can be gained from a reading of *Purdy v Woznesensky*.⁷⁹ In this case, Mackenzie JA imputed an ‘intention to produce such an effect’ to the wrongdoer, reasoning that the defendant should know that his attack on the husband would ‘in all likelihood’ produce ‘serious physical reactions’ on the wife’s part.⁸⁰ This wording can be interpreted as suggesting that the imputed intention towards the secondary victim is an intention based upon actual or constructive knowledge (with substantial certainty).⁸¹ Namely, the element of intention requires that the wrongdoer has or ought to have known/foreseen the disputed consequence, through his/her primary wrongdoing, as ‘substantially certain’ to be inflicted upon the secondary victim. This interpretation of intention remains in line with the Restatement (Third) of Torts §46 Comment *m*, where the intention aspect in terms of secondary victim cases has been represented as knowing that the

⁷⁵ *Johnson v The Commonwealth* (n 16) at 137 per Ferguson J.

⁷⁶ *Battista v Cooper* (n 29) at 229 per Bray CJ.

⁷⁷ See discussion in Chapter 3, sections 3.53 and 3.54.

⁷⁸ *Carter v Walker* (n 34) at para 263 per Buchanan, Ashley and Weinberg JJA.

⁷⁹ Relevant discussion of this case see section 5.2.

⁸⁰ ‘But upon consideration I have come to the opposite conclusion..., for it seems to me that the defendant must be presumed as a reasonable man to know of the vital concern which a wife instinctively feels for the safety of her husband and the serious physical reactions which an attack upon him threatening injuries to his person would in all likelihood produce in her’. See *Purdy v Woznesensky* (n 20) at para 5 per Mackenzie JA.

⁸¹ See further Chapter 3, section 3.4.

wrongdoing is ‘substantially certain to cause severe emotional harm’ to the witness or bystander.⁸²

5.423 The object of intention towards secondary victims

If the intention on the part of the wrongdoer towards the secondary victim can be construed as an intention in the sense of having known/foreseen *the result* as substantially certain to occur, what is the *result* that requires to have been foreseen? In other words, what is the object/target of intention towards secondary victims? As discussed in Chapter 3, the object of intention⁸³ pursuant to *Wilkinson v Downton* accorded with the consequence that actually resulted – the physical harm.⁸⁴ The authorities subsequent to *Wilkinson* further included the idea of recognised psychiatric illness within the category of consequences required for this tort, and therefore it also became relevant as an object of intention. However, as analysed in Chapter 3, section 3.22, the adoption of physical harm as well as recognised psychiatric illness as the object of intention seems implausible. It is very difficult, if not impossible, for the wrongdoer in the *Wilkinson* type of cases to foresee that his/her deliberate conduct – in most of the cases *words* – would actually result in physical harm or psychiatric illness, not to mention to intend it.⁸⁵ For this reason, the reformulation of the object of intention by the Supreme Court in *Rhodes v OPO* was sound and necessary. The Supreme Court reframed the object of intention to be ‘at least severe mental or emotional distress’, instead of ‘physical harm or recognised psychiatric illness’, whilst maintaining the latter as the consequence element.⁸⁶ This reformulation of the object of intention is sensible, and should apply to secondary victim cases as well. The

⁸² Restatement (Third) of Torts §46 (2012) (n 14) Comment m.

⁸³ See Chapter 3, section 3.22.

⁸⁴ ‘The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff...and has in fact thereby caused physical harm to her’. See *Wilkinson v Downton* [1897] 2 QB 57 at 58-59 per Wright J.

⁸⁵ For discussion see D Réaume, ‘The Role of Intention in the Tort in *Wilkinson v Downton*’ in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (2007) 533 at 540-541; see also *Rhodes v OPO* (n 15) at para 85 per Lady Hale and Lord Toulson. In the hypothetical example discussed in this paragraph, the wrongdoer ‘may not have had the intention to cause psychiatric illness, and he may well have given no thought to its likelihood’.

⁸⁶ See *Rhodes v OPO* (n 15) at para 88 per Lady Hale and Lord Toulson.

indirect impact of one's deliberate conduct would be more difficult to foresee/intend than the *direct* impact. If in general *Wilkinson* cases – cases only related to direct victims – the requirement of intention to cause recognised psychiatric illness or physical harm can be taken as inappropriate, it is all the more so in cases involving indirect or secondary victims. Therefore, in secondary victim cases, the object of intention towards secondary victims should be reframed in a similar fashion, as 'mental harm' or 'severe emotional distress'. While committing the wrongdoing directed at the primary victim, the wrongdoer should have foreseen mental harm or severe emotional distress as substantially certain to be inflicted upon the secondary victim.

5.424 Recklessness should *not* be included in the requisite mental element

In addition to intention, 'recklessness' is also incorporated in the Restatement (Third) of Torts §46 as an eligible form of mental state, which is a different approach from that employed in *Rhodes v OPO*.⁸⁷ As a result, in accordance with the Restatement (Third) of Torts §46, the mental state on the part of the wrongdoer towards the secondary victim might also take the form of recklessness. In contrast, the Supreme Court in *Rhodes v OPO* stated that '[r]ecklessness was not a term used in *Wilkinson v Downton* or *Janvier v Sweeney*', and that it might bring about 'problems of definition'. It therefore excluded recklessness from the mental element of the *Wilkinson* tort.⁸⁸ More arguments have been submitted to underpin this exclusion in Chapter 3. Namely, recklessness appears to be a concept which stays closer to negligence than to intention.⁸⁹ It seems more theoretically coherent to separate recklessness from intention, both in primary victim cases and in secondary victim cases. As argued in Chapter 3,⁹⁰ the boundary between this tort and negligently caused psychiatric injury can be drawn with more clarity provided that the notion of recklessness be kept out of the mental element of this tort.

⁸⁷ *ibid* at para 87 per Lady Hale and Lord Toulson.

⁸⁸ *ibid*.

⁸⁹ See Chapter 3, sections 3.53 and 3.54.

⁹⁰ See Chapter 3, section 3.661.

5.425 Unintended infliction of mental harm upon secondary victims could be dealt with by the tort of negligently caused psychiatric injury

In short, in a typical secondary victim case in respect of intentional infliction of mental harm, the mental state of the wrongdoer towards the primary victim should be an intention based upon purpose (or intention based upon ends or means).⁹¹ His or her mental status towards the secondary victim should be an intention based upon knowledge (foresight with substantial certainty).⁹² In contrast with these two forms of intention, recklessness or foreseeability should not be taken as an eligible mental state for this tort. In cases where the wrongdoer can merely foresee the mental harm as *likely*, rather than as substantially certain, to be inflicted upon the secondary victim, he/she does not possess the requisite mental state towards the secondary victim. In this situation, since the infliction of mental harm on the secondary victim is deemed to be *unintentional*, the secondary victim cannot recover on the basis of this tort. Detailed consideration of the other causes of action available to the secondary victim in these circumstances are beyond the scope of this thesis, but the most obvious is that the secondary victim might have a claim based on the tort of negligently caused psychiatric injury. Although in this situation the wrongdoing done to the primary victim is an *intentional* one, intentional/deliberate conduct can also attract negligence liability.⁹³ Following Lord Oliver's dicta in *Alcock*, there is no requirement for a specified form of conduct vis-a-vis the primary victim before secondary victim liability can be imposed. The secondary victim may have a claim as long as he/she can satisfy the prerequisites for duty of this negligent tort, in particular reasonable foreseeability and the three criteria of proximity (summarised from Lord Oliver's dicta) – a close tie of love and affection with the primary victim, presence at the incident or its immediate aftermath, and direct perception of the incident or its immediate aftermath through unaided senses.⁹⁴

⁹¹ See Chapter 3, section 3.3. For discussion on 'intention based upon ends or means', see section 3.321.

⁹² See Chapter 3, section 3.4.

⁹³ P Cane, 'Mens Rea in Tort Law' (2000) 20 OJLS 533 at 537: 'It follows that in principle, conduct may attract liability under more than one head. For instance, intentional conduct may attract liability for negligence and also under some other head of liability for which proof of intention is a condition.'

⁹⁴ See *Alcock v Chief Constable of South Yorkshire Police* (n 4) at 411 per Lord Oliver. See also

5.43 The consequence element

The consequence element, or the requirement for compensable damage, in this tort as claimed by secondary victims should be less contentious. The more contentious question is whether or not this requirement/threshold should be lowered. As discussed in Chapter 4, the traditional threshold of compensable damage – physical harm or recognised psychiatric illness – has been employed both in cases regarding negligently caused psychiatric injury and in the *Wilkinson* authorities.⁹⁵ Systematically speaking, irrespective of the disputed mental harm case being intentional, negligent, direct, or indirect/secondary,⁹⁶ the currently applicable threshold of compensable damage stays the same. If a case involving intentional infliction of mental harm upon a secondary victim were to arise at the present stage, based on logical and systematic analysis, the applicable consequence element would be *physical harm or recognised psychiatric illness*.

However, is this requirement, in particular the threshold of ‘recognised psychiatric illness’, a sound one? This is the core question examined in Chapter 4. Analysis there revolves around whether or not the threshold of ‘recognised psychiatric illness’ should be relaxed or lowered to ‘*mental harm*’ or ‘*severe/significant emotional distress*’. Some of the salient points from that discussion can be briefly revisited in this section, in order to determine whether a relaxation of the threshold of compensable damage is justifiable where secondary victims are involved.

Firstly, as explored in Chapter 4, when evaluating the existence of any ‘recognised psychiatric illness’, ICD-10⁹⁷ and DSM-V⁹⁸ are two pivotal criteria broadly adopted

Scottish Law Commission (n 3) para 2.21; Law Commission (n 3) paras 2.25-2.33.

⁹⁵ See Chapter 4, section 4.21.

⁹⁶ Although the status of secondary victims was not considered in the *Wilkinson* authorities, there are many secondary victim cases in the area of negligently caused psychiatric injury.

⁹⁷ World Health Organization, *International Statistical Classification of Diseases and Related Health Problems* (10th rev edn, 2016). See also Chapter 4, section 4.2221, ‘Recognised/Recognisable psychiatric illness’.

⁹⁸ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn, 2013).

by the courts. However, these two diagnostic systems are actually developed for diagnostic rather than for legal use. Therefore, there may exist an ‘imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis’.⁹⁹ Instead of any medical label given to the inflicted mental harm, the court should be more concerned with its nature and extent (such as the seriousness, duration, and impact).¹⁰⁰ An essential problem seems therefore to flow from the misplaced emphasis on the label of recognised psychiatric illness and the criteria by which it is assessed. This criticism is valid in both non-secondary victim cases and in secondary victim cases of this tort.

Secondly, though the threshold of recognised psychiatric illness may function stably in many cases, the insistence upon it without any exception could bring about problems and inconsistency.¹⁰¹ For instance, in some situations it might exclude pursuers who suffer from debilitating, non-trivial, or abnormal distress falling short of recognised labels.¹⁰² When compared with the recoverability of relatively moderate physical injury,¹⁰³ this exclusion (of mental harm without recognised labels) generates inconsistency between the legal treatment of mental harm and that of physical injury. Likewise, this criticism can be made of the rigid adoption of recognised psychiatric illness as the threshold of damage, as applicable to secondary victim cases of this tort.

In English and Scots case law, some judicial support can be observed for lowering the traditional threshold of damage, but mostly related to cases regarding intentional infliction of mental harm.¹⁰⁴ These authorities, as discussed in Chapter 4, are not directly related to secondary victims, but may assist here in considering the role played by intention in regard to relaxing the threshold of compensable damage. In parallel with these cases claimed by primary victims, intention is also an indispensable element

⁹⁹ *ibid* 25.

¹⁰⁰ See further Chapter 4, section 4.31.

¹⁰¹ See *ibid*.

¹⁰² E.g., patients with ‘partial’ PTSD who suffer from functional impairment, great health-related disability, far-from-trivial distress, or even suicidal thoughts. See further Chapter 4, section 4.31.

¹⁰³ A physical (personal) injury may be actionable provided that it is ‘more than negligible’. See *Dryden v Johnson Matthey Plc* [2018] UKSC 18; [2018] 2 WLR 1109 at paras 25, 40, and 48 per Lady Black.

¹⁰⁴ See Chapter 4, sections 4.326 and 4.331.

of this tort as claimed by secondary victims.

Lastly, it is not self-evident that a relaxation of the traditional threshold of damage would definitely entail a surge of (unmeritorious) suits. To start with, people who suffer from trivial emotional distress seldom have the incentive to embark upon litigation, as the expected quantum of damages would be small. Secondly, parallel to cases of this tort claimed by primary victims, in secondary victim cases the intention element can also function to prevent a likely floodgate effect after the relaxation of the traditional threshold. As discussed in the next section, in terms of the intention towards secondary victims, *knowledge/foresight with substantial certainty* is a demanding requirement, having its own control mechanisms. This in itself is likely to be sufficient to ring-fence potential claims. Moreover, even after such a relaxation, severe or significant emotional distress, namely a deviation from normal mental status or trivial emotional reactions, is not a low threshold which can be crossed easily.¹⁰⁵

In short, the consequence element of this tort as claimed by primary or secondary victims, as currently stated, is *physical harm or recognised psychiatric illness*. However, there seems to be no cogent reason why the consequence element cannot be lowered to *severe/significant emotional distress*. As analysed above, the arguments submitted for lowering the traditional threshold of damage in general (primary victim) cases of this tort can equally apply in secondary victim cases. The relevant control devices can function in both categories of case. It is reasonably arguable that the consequence element could be relaxed in both general (primary victim) cases and secondary victim cases of this intentional tort.

¹⁰⁵ For further discussion see Chapter 4, section 4.332.

5.5 Can the above prerequisites properly ring-fence potential claims?

5.51 The stance of the Restatement and foreign authorities

The possible range of secondary victim liability is extremely extensive. For instance, scenarios like terrorist attacks, indiscriminate killing, or the assassination of a celebrity, royalty, or national leader¹⁰⁶ can potentially bring about emotional distress to incalculable numbers of people. Whether or not the prerequisites canvassed above can properly ring-fence the potential claims is therefore a crucial question. The answer from the Restatement (Third) of Torts §46 appears to be negative. Besides the prerequisites of the tort of intentional infliction of emotional harm, the Restatement requires additional control devices in order to confine liability as regards secondary victims. Based upon the modern drift of court practice, the Restatement §46 advises that only secondary victims who are ‘close family members’ and who ‘contemporaneously perceive the event’ could have a case.¹⁰⁷ These limitations are in line with those required by Restatement §48 for secondary victims in cases regarding negligently inflicted emotional harm.¹⁰⁸ They are also consistent with the criteria imposed in *Alcock* for the purpose of ring-fencing negligence liability for secondary victims.

In all of the cases reviewed above in which a claim by a secondary victim was successful, that secondary victim was a close family member of the primary victim, either wife to husband or child to parent. The sibling relationship featured in *Carter v Walker*, yet in addition to being the brother of one of the primary victims (Donald Walker), the secondary victim was also the son of another primary victim (Marcia Walker). In *Bunyan v Jordan*, the plaintiff had no relationship with the person

¹⁰⁶ The assassination instance can be seen in Restatement (Third) of Torts §46 (2012) (n 14) Comment i.

¹⁰⁷ *ibid* Comment m.

¹⁰⁸ Restatement (Third) of Torts §48 (2012): ‘An actor who negligently causes sudden serious bodily injury to a third person is subject to liability for serious emotional harm caused thereby to a person who: (a) perceives the event contemporaneously, and (b) is a close family member of the person suffering the bodily injury’.

threatened,¹⁰⁹ but nor was her claim successful. As to the limitation requiring the secondary victims' *presence at the scene*, it seems to be either an existent contextual factor or a required condition in most of the reviewed cases, except for *Battista v Cooper*.¹¹⁰ In particular, in *Carter v Walker*, it was pointed out that the *Wilkinson* tort could not 'extend to nervous shock suffered by a distant victim'.¹¹¹ In short, there are elements in most of these cases that echo the negligence law limitations of 'a close tie of love and affection', 'present at the scene', and 'perception through unaided senses'.

However, from the opposite viewpoint, it is arguable that the degree and range of liability in terms of intentional wrongdoing can differ from that found in the law of negligence. There is no need for the tort of intentional infliction of mental harm to follow *unconditionally* the limitations imposed for the purposes of circumscribing negligence liability towards secondary victims. In *Battista v Cooper*, Bray CJ held that 'there is no reason for restricting the category of plaintiffs who can recover for physical injury from an intentional tort to those who could recover in the same circumstances if the tort were a negligent one, and every reason, in my opinion, for widening it. It is natural to expect much more lasting and serious emotional damage from the murder of a husband or father than from his death by being run down in the street...'; '...I think than [*sic*] an intentional tortfeasor, who must, *ex hypothesi*, be directing his mind to his act, ought to foresee the possibility of injury to a wider class of persons than those whom a court might find to have been within the reasonable foreseeability of the negligent driver of a car'.¹¹² A similar view is expressed in Fleming's *The Law of Torts*. The author considered the 'range of foreseeability' on the part of the intentional wrongdoer as 'larger in comparison', as a result of the wrongdoer 'hav[ing] directed his or her mind to the act', as well as of intentional wrongdoing 'deserv[ing] less leniency'.¹¹³

¹⁰⁹ In fact no one was shot in this case. See *Bunyan v Jordan* (n 51).

¹¹⁰ *Battista v Cooper* (n 29).

¹¹¹ *Carter v Walker* (n 34) at para 268 per Buchanan, Ashley and Weinberg JJA.

¹¹² *Battista v Cooper* (n 29) at 229 per Bray CJ.

¹¹³ Fleming (n 29) 42.

5.52 The approach proposed by this thesis

Given the arguments in the section above, the stance adopted by the Restatement (Third) of Torts §46, and in the case law applying similar restrictions, seems disputable. It is not self-evident why intentionally harmed secondary victims must be subjected to entirely the same limitations designed for negligently caused psychiatric injury cases. Certainly, factors concerning proximity are still important considerations in respect of intentional cases. Yet, as will be argued, the mental element of this tort claimed by secondary victims – knowledge/foresight with substantial certainty – can be seen as having incorporated considerations regarding proximity, which would come into play in determining secondary victim liability in intentional cases. It is therefore strongly arguable that the prerequisites of this tort as claimed by secondary victims are capable of ring-fencing potential claims without recourse in addition to the restrictions applied by the law of negligence. The reasons will be further explained in the following sections.

5.521 The range of potential secondary victims has already been narrowed after the decision in *Rhodes v OPO*

The approach of the Restatement (Third) of Torts is to impose identical limitations to both intentional and negligent cases, in order to keep the liability for secondary victims within bounds. However, as previously mentioned the Restatement (Third) of Torts §46 imposes liability in respect of both *intention* and *recklessness*. As a result, the range of potential secondary victims who can invoke Restatement (Third) of Torts §46 would be much wider, and accordingly it appears less unreasonable to implement control mechanisms in parallel with its negligent counterpart.¹¹⁴ In contrast, after the decision in *Rhodes v OPO*, the idea of recklessness has been clearly excluded from the mental element of the *Wilkinson* tort.¹¹⁵ As argued above, this exclusion of

¹¹⁴ As discussed in the foregoing section on the mental element, recklessness should be regarded as conceptually closer to negligence than to intention.

¹¹⁵ *Rhodes v OPO* (n 15) at para 87 per Lady Hale and Lord Toulson.

recklessness is sensible, and it is applicable to both non-secondary victim and secondary victim cases. This exclusion by itself narrows the range of prospective secondary victims to a considerable extent, and there is consequently less need for control devices of the type found in the law of negligence.

5.522 ‘Knowledge/foresight with substantial certainty’ has its own control mechanism

More importantly, the prerequisites of this tort claimed by secondary victims should be able to circumscribe potential claims because the mental element – intention based upon knowledge/foresight of the mental harm as substantially certain to occur – can also function as a proper control device. This point will be elucidated as follows:

5.5221 ‘Knowledge/foresight with substantial certainty’ is a high threshold to be met:

First of all, it is difficult to establish that mental harm was substantially certain to occur. This requires the claimant to show that on the basis of objective knowledge, it was highly probable, close to *certain* or *inevitable*, that mental harm would be suffered. Furthermore, it must be established that the wrongdoer was subjectively aware of, or ought to have known, the near *certain* or *inevitability* of this harm resulting from his/her intentional conduct. As discussed in Chapter 3,¹¹⁶ Wright J stated in *Wilkinson v Downton* that ‘[i]t is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person’, as a result ‘an intention to produce such an effect must be imputed’.¹¹⁷ This statement perfectly reflects the aforementioned substantial certainty or inevitability. Precisely because the foreseen harm is so probable, nearly certain to occur, so ‘it is difficult to imagine that...could fail to produce grave effects’. This requirement of *actual or constructive foresight with substantial certainty* is far removed from mere *foreseeability*. In the cases of *Johnson*

¹¹⁶ See Chapter 3, section 3.4433.

¹¹⁷ *Wilkinson v Downton* (n 84) at 59 per Wright J.

*v The Commonwealth*¹¹⁸ and *Battista v Cooper*,¹¹⁹ discussed above, it was required only that the impact upon secondary victims was foreseeable. Such a requirement is a long way from that entailed in ‘it is difficult to imagine that [harm] could fail to [occur]’. The level of intention proposed here as a prerequisite (based upon knowledge/foresight with substantial certainty) sets up a much higher threshold than foreseeability for potential secondary victims to surmount.

5.5222 Considerations regarding proximity can be taken as incorporated in the mental element; indicators of ‘knowledge/foresight with substantial certainty’ specific to secondary victim cases

Furthermore, the required level of intention (knowledge/foresight with substantial certainty) would ring-fence the range of prospective secondary victims because it has already incorporated considerations related to proximity. Thus the imposition of additional limitations as regards proximity may be unnecessary. After an intentional attack, who, as a secondary victim, can be foreseen as substantially certain to develop ‘severe mental or emotional distress’?¹²⁰ In the examples suggested above of terrorist attacks, indiscriminate killing, or the assassination of a celebrity, the wrongdoing might potentially bring distress and anxiety to a great number of people all over the world. Yet in most of the cases the distress suffered is not so serious, nor would it last for long.¹²¹ In rare cases it may be foreseen as *possible* that some people – e.g. a fan of the assassinated celebrity – could develop severe emotional distress. However, ‘possibility’ is far from ‘certainty’ or ‘inevitability’. And it appears unwarranted to hold a wrongdoer as having foreseen as *substantially certain* or *inevitable*, that severe emotional distress would be inflicted upon (a) certain secondary victim(s), *where the*

¹¹⁸ *Johnson v The Commonwealth* (n 16) at 137 per Ferguson J.

¹¹⁹ *Battista v Cooper* (n 29) at 229 per Bray CJ.

¹²⁰ As explored in section 5.423, the object of intention towards secondary victims should be formulated as ‘severe mental or emotional distress’; i.e., ‘severe mental or emotional distress’ is the object to be foreseen as substantially certain or inevitable to happen. Normal, trivial, or transient emotions cannot count as ‘severe mental or emotional distress’.

¹²¹ E.g., person learning via television or radio of a terrorist attack committed upon unknown individuals in a foreign country may feel distressed or uncomfortable, but that distress is likely to be short-lived.

*wrongdoer can hardly identify the existence or the range of the latter.*¹²² In the absence of any special ground, it would be extremely difficult for a secondary victim to establish that, as a result of the *primary* attack, the wrongdoer could have foreseen it as *substantially certain or inevitable* that this victim would suffer *severe* mental or emotional distress.

The special grounds, or crucial considerations to be put in the balance when determining the question of knowledge/foresight with substantial certainty, include factors relevant, as well as irrelevant, to proximity. Considerations irrelevant to proximity encompass the (brutal, horrifying, and inhuman) way in which the wrongdoer conducted the wrongdoing, the individual predisposition on the part of the secondary victim and so on. Considerations relevant to proximity comprise the relationship between the secondary and the primary victim, and where and in what way the secondary victim perceived the wrongdoing and its consequences. These proximity factors are of major significance in the determination of knowledge/foresight with substantial certainty. For instance, the commonly anticipated levels of emotional distress suffered by the *mother* of the primary victim would differ to a great extent from those experienced by a stranger. Accordingly, the results of whether they could prove ‘foresight with substantial certainty’ or ‘foresight as a mere possibility’ in relation to the development of such severe emotional distress would also be different. Likewise, closeness to the scene of the primary wrongdoing, as well as the manner of perception, would play significant roles in this determination,¹²³ since both would have a foreseeable impact upon the emotional reactions of secondary victims.

Therefore, in secondary victim cases of this tort, considerations regarding proximity can be taken as being incorporated in the determination of ‘knowledge/foresight with

¹²² As reinforced by the Restatement (Third) of Torts §1, which suggests that ‘[t]he applications of the substantial-certainty test should be limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area. The test loses its persuasiveness when the identity of potential victims becomes vaguer and when, in a related way, the time frame involving the actor’s conduct expands and the causal sequence connecting conduct and harm becomes more complex’. See Restatement (Third) of Torts §1 (2010) Comment e.

¹²³ The determination of knowledge/foresight with substantial certainty.

substantial certainty'. Without the presence of *any* factor regarding proximity (which factor must be known to the wrongdoer),¹²⁴ it would be almost impossible for the wrongdoer to foresee the severe emotional distress (of a secondary victim) as substantially certain or inevitable to occur. In most of the cases, factors concerning relational as well as spatial/temporal proximity should be *required* to reflect the knowledge/foresight with substantial certainty. In the light of the cases discussed above from other jurisdictions, relational proximity should be construed in a strict sense, as restricted to the relationship between parents and children, or between spouses or (legitimate) partners. As to spatial/temporal proximity, the secondary victim should be either present at the scene or in the immediate vicinity. The less close the secondary victim is to the scene, the less certain it is that his or her severe emotional distress can be foreseen by the wrongdoer.

In short, in most of the secondary victim cases, knowledge/foresight with substantial certainty (of the inflicted severe emotional distress) can be established when there exist the factors regarding relational and spatial/temporal proximity, with or without the company of other factors irrelevant to proximity. Admittedly, under exceptional circumstances, knowledge/foresight with substantial certainty may be established where the secondary victim, despite being *present* at the scene, has *no* relationship with the primary victim. The exceptional circumstances might include those where the primary victim was wronged and injured in an extremely brutal, horrifying, and inhuman manner, which could readily traumatise any spectator of normal sensibilities;¹²⁵ or where the personal predisposition or vulnerability of the spectator present at the scene is known to the wrongdoer.

¹²⁴ As to the point that factors regarding proximity must be *known* to the wrongdoer, see section 5.5223.

¹²⁵ The first exceptional circumstance should not be understated. For instance, simply shooting a person dead in front of others could not be counted as an 'extremely brutal, horrifying, and inhuman' manner. Since, through this manner of attack upon the primary victim, a spectator *unrelated* to the primary victim can be foreseen as substantially certain to suffer severe emotional distress, the provocativeness and gravity of the wrongdoing should be at a very high level. Some ancient criminal penalties can possibly be taken as examples – e.g. skinning people alive or mutilating people in a slow manner within sight of the spectator.

5.5223 These indicators – in particular factors regarding proximity – must be *known* to the wrongdoer

It should be emphasised that, since the aforesaid factors – in particular those regarding proximity – are considerations for the determination of ‘*knowledge/foresight* with substantial certainty’, they *require to be known* to the wrongdoer. For instance, in addition to the objective existence of a close tie of love and affection between the primary and the secondary victims, the *knowledge of this relationship* on the part of the wrongdoer must also be proved. This kind of knowledge can more easily be found if the wrongdoer is an acquaintance of the victims. Otherwise, contextual circumstances¹²⁶ are needed to allow the wrongdoer, or any reasonable person, to identify the close family relationship between those present at the scene of the wrongdoing. The existence of the close family relationship between primary and secondary victims requires to be known to the wrongdoer, as the relevant level of intention towards the secondary victim cannot be formed in the absence of this knowledge.

5.6 Conclusion

The answers to the core questions raised in this Chapter can be summarised here in order. Firstly, *systematic coherence* indicates that secondary victims in the area of intentional infliction of mental harm should be entitled to compensation. The proposed prerequisites of this tort as claimed by secondary victims encompass the conduct element, the mental element, and the consequence element. The conduct element is *infliction* of mental harm on the secondary victim through the *deliberate offence* perpetrated upon the primary victim. The mental element, namely the intention on the part of the wrongdoer towards the secondary victim, requires an *intention based upon actual or constructive knowledge with substantial certainty*, in the sense of knowing or foreseeing the severe emotional distress of the secondary victim as substantially

¹²⁶ E.g., the interactions between the primary and the secondary victims, the conversations between them, or other sources of information.

certain to be caused. Admittedly, in the light of the current law the consequence element of this tort in relation to secondary victims is to be construed as *physical harm or recognised psychiatric illness*. However, it is arguable that the threshold should be lowered simply to *mental harm* or *severe/significant emotional distress*. These prerequisites, in particular the mental element, have the capability adequately to circumscribe liability for secondary victims in this intentional field. Intention based upon ‘knowledge/foresight with substantial certainty’ is a tremendously high threshold for secondary victims to surmount. The limitations or factors as regards proximity as employed in negligent cases can be taken as incorporated in the determination of ‘knowledge/foresight with substantial certainty’. In most of the cases, the factors regarding relational and spatial/temporal proximity are *required*, with or without the company of other factors unrelated to proximity, to reflect knowledge/foresight with substantial certainty. These factors are important considerations, which must be *known* to the wrongdoer, but they need not be adopted as categorical limitations.

Chapter 6 Conclusion

On the basis of an in-depth analysis of existing authorities, this thesis has reconceptualised the essential elements of the *Wilkinson* tort as discussed in *Rhodes v OPO* – most notably issues of conduct and justification, intention, mental harm, and the status of secondary (indirectly injured) victims. The research presented in previous chapters permits a reconstruction of the framework of this delict or tort, which addresses the anomalies of earlier authorities and provides a better understanding of the difficulties inherent in this area of liability.

1. The typical conduct patterns of this tort that can be actionable

According to the majority of the Supreme Court in *Rhodes v OPO*, the conduct element of the *Wilkinson* tort requires ‘words or conduct directed at the claimant for which there is no justification or excuse’.¹ However, the question arises what qualifies as conduct for these purposes. Although the relevant wrongdoing could broadly be classified as ‘deceptive’, ‘threatening’, or ‘abusive’,² its exact features have not been pinpointed with clarity.

Study of the recurring types of conduct, which have been held as actionable in this and in other jurisdictions, as well as of the aggravating factors which have frequently been observed therein,³ indicates that the conduct patterns of this tort can be constructed through a combination of five types of conduct with three aggravating factors:⁴

¹ *Rhodes v OPO* [2015] UKSC 32; [2016] AC 219 at para 88 per Lady Hale and Lord Toulson.

² *ibid* at para 77 per Lady Hale and Lord Toulson.

³ For relevant analysis see Chapter 2, section 2.12.

⁴ See Chapter 2, section 2.13.

A. False Statement

- a. In general: Playing on or interfering with the victims' emotional bonds with their nearest and dearest (mostly) through false statements, which could significantly impact their mental well-being.
- b. Abusing power or unequal status in conjunction with playing on or interfering with the victims' emotional bonds (mostly) through false statements.

B. Threatening

- a. In general: Threatening or coercing victims into doing something, which could significantly impact their mental well-being.
- b. Exploiting the victims' vulnerability in conjunction with threats or coercion.
- c. Abusing power or unequal status in conjunction with threats or coercion.
 - a) In the context of employment: Abusing power and threatening employees with work-related negative consequences.
 - b) In other contexts: Abusing power and threatening the victims with negative consequences.

C. Insults or other abusive conduct

- a. In general: Insults or other abusive conduct, which could significantly impugn the victims' dignity and impact their mental well-being.
- b. Exploiting the victims' vulnerability in conjunction with insults or other abusive conduct.
- c. Abusing power or unequal status in conjunction with insults or other abusive conduct.
 - a) In the context of employment.
 - b) In other contexts.

D. Inflicting mental harm through injury to a third party – cases involving 'secondary victims'.

E. Other conduct patterns (which can be taken as grave and capable of impacting the victims' mental well-being significantly).

The listing above is significant in assisting a better understanding of the conduct patterns of this tort likely to be found actionable. The importance of the gravity (of the disputed conduct), mostly in the form of aggravating factors, has been reflected in them, particularly in the first three conduct patterns. Where more aggravating factors are involved the more likely it is that the wrongdoing in question would be regarded as egregious, and the more likely it is that the case would be held as actionable.

Analysis in Chapter 2 has contrasted the conduct patterns of this tort with those of other related delicts/torts.⁵ It is clear that the territory occupied by the latter leaves a number of significant gaps in protecting the rights of the person, and the tort under discussion here plainly has an important role to play in filling these gaps.

2. The potential justifications/justificatory grounds (that should arguably be treated as defences)

The conduct element of this tort is stated in *Rhodes v OPO* as being ‘words or conduct directed at the claimant’ for which ‘there is no justification or excuse’.⁶ After probing the reasoning of the Supreme Court in this connection, it appears very likely that *the absence of justification or excuse* was regarded by the Supreme Court as an integral part of the conduct element.⁷ As a result, *justifications or excuses* cannot be adopted as defences, but their existence goes to the conduct element and can negate liability. Arguably, the potential justifications/justificatory grounds which could be used in this tort to defeat the conduct element might include: *consent, discharging duties or exercising rights, and freedom of expression*.⁸ Although truth does not function as an infallible justification for this tort, when weighing freedom of expression against

⁵ More detailed results of comparison between different conduct patterns of this tort and these recognised delicts/torts, see Chapter 2, section 2.25.

⁶ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

⁷ See Chapter 2, section 2.312.

⁸ Relevant analysis see Chapter 2, section 2.32.

mental integrity, the truth of the defendant's words can certainly be placed in the balance.

An argument further developed in Chapter 2, however, is that the approach of the Supreme Court is not entirely satisfactory in treating the absence of justification or excuse as a part of the conduct element of this tort.⁹ An alternative approach would be to remove the controversial formulation of 'for which there is no justification or excuse', and to rephrase the conduct element in a way that more clearly reflects the gravity of conduct and fairly distributes the burden of proof. In this way the conduct element might usefully be presented in the form of conduct patterns as proposed above. On the other hand, any justification/justificatory ground – e.g. *consent*, *discharging duties or exercising rights*, and *freedom of expression* – should be treated as a defence. This approach would better differentiate between the notion of *gravity of the conduct* and that of *justification for the conduct*. More importantly, it distributes the burden of proof in a fairer way. The onus of establishing a defence would be placed upon the defendant. On the basis of this proposed approach, the more egregious the disputed conduct, the stronger the defence (justification) it would require.

3. The mental element should include two levels of intention – in the form of *purpose (ends or means) or knowledge/foresight with substantial certainty*

As explored in Chapter 3, although the Supreme Court in *Rhodes v OPO* reformulated the mental element of the *Wilkinson* tort as 'an intention to cause at least severe mental or emotional distress',¹⁰ the questions of what constitutes intention, and of the relationship between intention and the antecedent notion of 'calculated' (as employed in *Wilkinson v Downton*), both remain unclear. An exhaustive investigation of the foundations of intention and different interpretations of the term 'calculated' indicates that the appropriate meaning/basis of intention and its functionality are as follows:

⁹ Analysis see Chapter 2, section 2.313.

¹⁰ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

First of all, in contrast with the most stringent standard of intention that insists solely upon *intention based upon purpose (ends or means)*, it is arguably more appropriate to include the scienter of *knowledge/foresight with substantial certainty* along with *purpose (ends or means)* in the construct of intention. Secondly, the decision in *Rhodes v OPO* ‘not to include recklessness in the definition of the mental element’¹¹ is well-supported.¹²

The inclusion of *knowledge/foresight with substantial certainty* within the construct of intention is sensible and meaningful, for the following four reasons. A) It is more warranted in theory to categorise this frame of mind as ‘intention/intentional’, rather than to place it under the label of ‘unintentional’, ‘negligent’, or ‘reckless’.¹³ B) The inclusion of the scienter of both *purpose (ends or means)* and *knowledge/foresight with substantial certainty* in the construct of intention would be compatible with most of the existing case law in relation to this tort. C) The notion of *knowledge/foresight with substantial certainty* can be considered as the most suitable interpretation of the equivocal term ‘calculated’ (as employed in *Wilkinson v Downton*).¹⁴ D) Another reason to support the inclusion of *knowledge/foresight with substantial certainty* is that, as discussed in Chapter 5, the mental state on the part of the wrongdoer towards the secondary victim would *not* be an intention based upon purpose (ends or means), but it can be characterised as an intention based upon knowledge (foresight with substantial certainty).¹⁵

As to the function of intention in relation to this tort, in *Rhodes v OPO*, the majority’s rephrasing of the object of intention as ‘at least severe mental or emotional distress’, whilst maintaining ‘recognised psychiatric illness’ as the required threshold of consequence,¹⁶ can in a sense be construed as giving the mental element of this tort an ‘ancillary’ role,¹⁷ since there is no requirement that the resulted ‘recognised

¹¹ *ibid* at para 87 per Lady Hale and Lord Toulson.

¹² See analysis in Chapter 3, section 3.661.

¹³ Analysis see Chapter 3, section 3.4431.

¹⁴ See Chapter 3, section 3.4432.

¹⁵ See Chapter 5, section 5.422.

¹⁶ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

¹⁷ Regarding the ‘ancillary’ function of intention in tort, see P Cane, ‘Mens Rea in Tort Law’ (2000) 20 OJLS 533 at 547-548. Relevant analyses also see Chapter 3, section 3.65.

psychiatric illness' must be foreseen or foreseeable.¹⁸ Arguably, a more important role may be played by the mental element of this tort in future – namely to serve an 'independent' function, to 'justify imposing tort liability for types of harm which would not otherwise be actionable'¹⁹ (i.e. to justify granting compensation for mental harm falling short of recognised psychiatric illness), as explored in Chapter 4.

Thus the framework of analysis outlined above, and discussed in greater depth in earlier chapters, provides a more nuanced definition of the meaning and functionality of intention. It also elucidates more clearly the relationship between the concept of intention and that of 'calculated' as employed in the case law.

4. Mental harm or severe/significant emotional distress as the lowered threshold of compensable damage

The consequence element of the *Wilkinson* tort, as currently stated by the majority of the Supreme Court in *Rhodes v OPO*, requires 'physical harm or recognised psychiatric illness'.²⁰ However, Lord Neuberger argued that 'it should be enough for the claimant to establish that he suffered significant distress as a result of the defendant's statement'.²¹ Accordingly, questions arise as to the conceptual difference between recognised psychiatric illness, severe/significant emotional distress, and mere emotional distress, and whether there is any cogent ground for maintaining or lowering the threshold of recognised psychiatric illness.

To answer these crucial questions, Chapter 4 has firstly argued that the boundary of actionable mental harm should be determined by reference to *deviation from normal or trivial emotions*.²² It is possible and practicable for mental harm to be recognised as setting in at a level between recognised psychiatric illness and mere emotional distress.

¹⁸ See *Rhodes v OPO* (n 1) at paras 87-88 per Lady Hale and Lord Toulson.

¹⁹ See Cane (n 17) at 546.

²⁰ *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

²¹ *ibid* at para 119 per Lord Neuberger.

²² See Chapter 4, section 4.221.

Secondly, having explored the problems and inconsistencies arising from the categorical adoption of recognised psychiatric illness as the threshold of compensable damage,²³ it is proposed that the threshold of recognised psychiatric illness should be relaxed in cases regarding intentional infliction of (stand-alone) mental harm.²⁴ Thirdly, the concepts of ‘mental harm’ or ‘severe/significant emotional distress’ can adequately denote the lowered threshold of compensable damage.²⁵ For a mental condition to be regarded as ‘mental harm’ or ‘severe/significant emotional distress’, apart from its being serious and prolonged, the criteria of ‘Deviance’, ‘Distress’, ‘Dysfunction’, and ‘Danger’²⁶ can be taken into consideration in combination with professional medical assessments.

Arguably, the lowered threshold of ‘severe/significant emotional distress’ or ‘mental harm’ (in the sense of *deviation from normal or trivial emotions*) can avoid the problems and inconsistencies arising from the insistence upon recognised psychiatric illness. It can shift the focus of courts from *diagnostic labels* back to the *nature and extent of mental harm actually suffered by the claimants*. This proposed framework is unlikely to trigger a flood-gate effect,²⁷ and should be feasible in practice by reference to the criteria of ‘Deviance’, ‘Distress’, ‘Dysfunction’, ‘Danger’ and professional medical assessments.

5. The proposed framework of this tort when claimed by secondary victims

Apart from the conduct, mental, and consequence elements, a further question arises from the term ‘directed at’ employed in the conduct element.²⁸ Does this term imply that claimants injured *indirectly* – i.e. the secondary victims – would have *no* claim on the basis of *Wilkinson v Downton*? Following investigation in Chapter 5, it is argued on the ground of *systematic coherence* that secondary victims in the area of intentional

²³ See Chapter 4, section 4.31.

²⁴ See Chapter 4, section 4.331.

²⁵ See Chapter 4, section 4.332.

²⁶ Relevant analysis see *ibid*.

²⁷ For arguments see Chapter 4, section 4.331.

²⁸ See *Rhodes v OPO* (n 1) at para 88 per Lady Hale and Lord Toulson.

infliction of mental harm should be entitled to compensation.²⁹ The proposed prerequisites of this tort as claimed by secondary victims encompass the conduct element, the mental element, and the consequence element as presented below:

The conduct element is *infliction* of mental harm on the secondary victim, in combination with the *deliberate offence* perpetrated upon the primary victim.³⁰

The mental element, namely the mental state on the part of the wrongdoer towards the secondary victim, requires an *intention based upon actual or constructive knowledge/foresight with substantial certainty*,³¹ in the sense that the wrongdoer knows or foresees that the severe/significant emotional distress or mental harm is substantially certain to be caused to the secondary victim.

Admittedly, in the light of the current law, the consequence element of this tort in relation to secondary victims is to be construed as *physical harm or recognised psychiatric illness*. However, it is arguable that the threshold should be lowered to *mental harm or severe/significant emotional distress*.³²

These prerequisites to liability, in particular the mental element, have the capability adequately to circumscribe liability for secondary victims in this intentional field. In particular, intention based upon ‘knowledge/foresight with substantial certainty’ is a tremendously high threshold for secondary victims to surmount;³³ and the limitations or factors as regards proximity (as employed in negligence cases) can be taken as incorporated in the determination of ‘knowledge/foresight with substantial certainty’.³⁴ These factors (regarding proximity) are important considerations, which must be *known* to the wrongdoer, although they need not be adopted as categorical limitations.

²⁹ See Chapter 5, section 5.3.

³⁰ See Chapter 5, section 5.411.

³¹ See Chapter 5, section 5.422.

³² See Chapter 5, section 5.43.

³³ See Chapter 5, section 5.5221.

³⁴ See Chapter 5, section 5.5222.

Arguably, these proposed prerequisites can pave the way for the deserving secondary victim cases that may appear in the future, providing a feasible framework of claim without triggering a flood-gate effect.

In sum, this analysis and reconceptualisation of the three essential elements of this tort has the potential to resolve many of the complex problems to which it has given rise over the years and which have troubled the judiciary and academic commentators alike. This clarification of the current law, and the provision of feasible models with regard to its essential elements, point the way forward to rational development of this tort in future. These can be taken as the original contribution of this thesis.

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